No. 15-6092

Title:	Richard Mathis, Petitioner v. United States
Docketed:	September 17, 2015
Lower Ct:	United States Court of Appeals for the Eighth Circuit
Case Nos.:	(14-2396)
Decision Date:	May 12, 2015
Rehearing Denied:	June 23, 2015

Questions Presented

---Date---	-------Proceedings and Orders----------
Sep 15 2015	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 19, 2015)
Oct 14 2015	Order extending time to file response to petition to and including November 18, 2015.
Nov 16 2015	Order further extending time to file response to petition to and including December 18, 2015.
Dec 17 2015	Brief of respondent United States filed.
Dec 30 2015	Supplemental brief of respondent United States filed.
Dec 31 2015	DISTRIBUTED for Conference of January 15, 2016.
Jan 19 2016	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Feb 22 2016	Brief of petitioner Richard Mathis filed.
Feb 22 2016	Joint appendix filed.
Feb 29 2016	Brief amici curiae of National Association of Federal Defenders, et al. filed.
Feb 29 2016	Brief amici curiae of American Immigration Lawyers Association, et al. filed.
Mar 4 2016	SET FOR ARGUMENT ON Tuesday, April 26, 2016
Mar 14 2016	Record requested from the U.S.C.A. 8th Circuit.
Mar 15 2016	CIRCULATED.
Mar 23 2016	Record received from U.S.C.A. 8th Circuit. (1 Box)
Mar 23 2016	Brief of respondent United States filed. (Distributed)
Mar 29 2016	Brief amicus curiae of Immigration Reform Law Institute filed. (Distributed)
Apr 15 2016	Reply of petitioner Richard Mathis filed. (Distributed)
Apr 26 2016	Argued. For petitioner: Mark C. Fleming, Boston, Mass. For respondent: Nicole A. Saharsky, Assistant to the Solicitor General, Department of Justice, Washington, D. C.
Jun 23 2016	Judgment REVERSED. Kagan, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Sotomayor, JJ., joined. Kennedy, J., and Thomas, J., filed concurring opinions. Breyer, J., filed a dissenting opinion, in which Ginsburg, J., joined. Alito, J., filed a dissenting opinion.
Jul 25 2016	JUDGMENT ISSUED
Aug 18 2016	Record from U.S.C.A. 8th Circuit has been returned.

RECORD AND BRIEFS

NO. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis - Petitioner,

vs.

United States of America - Respondent.

ORIGINAL

Supreme Court, U.S.
FILED
SEP 15 2015
OFFICE OF THE CLERK

Motion For Leave to Proceed In Forma Pauperis

Pursuant to Rule 39 of the Rules of this Court, the Petitioner, Richard Mathis, asks leave to file the attached Petition for Writ of Certiorari, without prepayment of costs, and to proceed in forma pauperis.

The petitioner was represented by counsel appointed pursuant to Title 18, United States Code § 3006(a) (the Criminal Justice Act) both in the district court and on appeal to the Eighth Circuit Court of Appeals. Petitioner is incarcerated in the Federal Bureau of Prisons and remains indigent.

RESPECTFULLY SUBMITTED,

Melanie Kiefer for James Whalen

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NO. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

ORIGINAL

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Richard Mathis - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis - Petitioner,

vs.

United States of America - Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner, Richard Mathis, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Case No. 14-2396, entered on May 12, 2015. Rehearing en banc was denied on June 23, 2015.

OPINION BELOW

On May 12, 2015, a panel of the Court of Appeals entered its opinion affirming the judgment of the United States District Court for the Southern District of Iowa. The opinion of the Court of Appeals is reported as *United States v. Mathis*, 786 F.3d. 1068 (8th Cir. 2015).

JURISDICTION

The Court of Appeals entered its judgment on May 12, 2015. On June 23, 2015, the Court of Appeals denied the petitioner's request for rehearing and rehearing en banc. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1):

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under § 922(g).

18 U.S.C. § 924(e)(2):

> As used in this subsection –
>
> * * *
>
> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –
>
> (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another;

Iowa Code § 713.1 (1989) (burglary):

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary. (emphasis added)

Iowa Code § 702.12 (1989) (defining "occupied structure")

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an *"occupied structure"* whether or not a person is actually present....

STATEMENT OF THE CASE

The petitioner pled guilty to unlawful possession of a firearm as a previously convicted felon, in violation of 18 U.S.C. § 922(g)(1). *Mathis*, 786 F.3d at 1070. Because the district court found that petitioner had at least three prior felony convictions for violent felonies (including five Iowa burglary convictions), the court sentenced him to the statutory minimum sentence of fifteen years of imprisonment under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1). *Id.* at 1070-71. On appeal, the Eighth Circuit found that at least two of petitioner's convictions for burglary, and an uncontested conviction for the interference with official acts inflicting serious injury, qualified defendant for armed career criminal sentencing. *Id.* at 1075.

In determining whether petitioner's burglary convictions were for "generic burglary" as required for ACCA purposes, *see Taylor v. United States*, 495 U.S. 575, 599, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990), the Court of Appeals recognized that Iowa's burglary offense is broader than generic burglary because the offense's central element of an "occupied structure" includes vehicles as well as buildings and structures. *Mathis*, 786 F.3d at 1074. However, because a separate Iowa statutory provision defines "occupied structure" alternatively, the court utilized the "modified categorical approach" to find that the alternative definition involved in two of the prior burglary convictions was for a building (specifically, a garage):

> Upon examining the charging documents that correspond with *Mathis's* burglary convictions, *Mathis* was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a "building," we find that *Mathis* was convicted under the element of the Iowa burglary statute that conforms with generic burglary.

Mathis, 786 F.3d at 1075.

Petitioner respectfully submits that the court's inquiry should have ended with the finding that the Iowa burglary statute sweeps more broadly than generic burglary because of the wide–ranging occupied structure element. It was error to extend the modified categorical approach to the separate statutory definitional provision, which provided mere means of satisfying the occupied structure element, not further discrete elements of the offense itself.

REASONS FOR GRANTING THE WRIT

There is a circuit split on whether the modified categorical approach should extend to statutory definitional provisions that are separate from, but serve to explain, terms used in a statute of conviction. *See Mathis*, 786 F.3d at 1075 n.7 (noting split). This split, in turn, is grounded in part on a larger split over whether "statutory alternatives" for purposes of invoking the modified categorical approach includes alternatives that are deemed "means" of proving an element rather than a necessary "element" itself of conviction. *See Mathis*, 786 F.3d at 1075 n.6 (noting split); *compare United States v. Ozier*, No. 14-6439, 2015 WL 4636669, at *4-6 (6th Cir. August 5, 2015) (eschewing distinction between means and elements in rejecting argument that alternative statutory definitions of "habitation" element in burglary statute were beyond inquiry under the modified categorical approach), *with Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) (requiring that statutory alternatives set forth alternative elements and not merely means "on which the jury may disagree yet still convict."), *and United States v. Fuertes*, Nos. 13-4755 and 13-4931, 2015 WL 4910113, at *8 (4th Cir. Aug. 18, 2015) (agreeing with *Rendon* that inquiry focuses on alternative elements not alternative means); *see generally United States v. Vinson*, No. 14-4078, 2015 WL 4430889, at *5 (4th Cir. July 21, 2015) (finding case law definitions of "assault" element were alternative elements, not alternative means, when the definitions "provide full functioning, stand alone, alternative definitions of *the offense itself*, and these definitions capture the entire universe of ways in which an assault may be

committed."); *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1777 (2014) (finding that alternative state case law definitions of "assault" element were merely alternative means of establishing the element and not alternative elements or versions of the assault offense that permits application of the modified categorical approach).

Much of the split stems from a sentence in footnote 2 of this Court's decision in *Descamps v. United States*, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), which appeared to reject any distinction between means and elements in applying the modified categorical approach. *Descamps*, 133 S. Ct. at 2285 n.2. Because that sentence arguably contradicts the elements-centric focus throughout the *Descamps* opinion, it has contributed to division over whether courts should consider whether statutory alternatives state means rather than elements before applying the modified categorical approach. *See Rendon v. Holder*, 782 F.3d 466, 469-74 (9th Cir. 2015) (Graber, J., and Kozinski, J., separately dissenting from the denial of rehearing).

The modified categorical approach was never meant to be this hard. This Court's focus in both the categorical and modified categorical approaches has always been on the statute of conviction simpliciter. *See Descamps*, 133 S. Ct. at 2283-88; *Shepard v. United States*, 544 U.S. 13, 25-26, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005); *Taylor v. United States*, 495 U.S. 575, 599-600, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990). And this court's instructions have been straightforward: list the statute's elements; if they conform to or are included within the generic crime,

then conviction under the statute qualifies as an ACCA predicate; if not, then not. Of course, if the statute is written to provide for alternative charging because it states alternative ways to violate it, then it is necessary and appropriate to examine the conviction records to see which of those alternative charges under the statute was the basis for conviction. The simple statutory elements have always been the key.

The willingness, however, of the *Mathis* court and others to start delving into separate statutory or case law definitions of terms in the statute of conviction has sent courts into the means versus elements thicket, because definitional provisions are by their nature explanatory and descriptive of the means by which one might satisfy the term being defined. Much of the argument over means versus elements would go away if this court would clarify that a predicate conviction must qualify based solely on the terms as stated in the statute of conviction.

A focus strictly on the language of the statute of conviction also accords with the focus of the ACCA on uniformity of application for any given predicate. "Congress . meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287 A narrow focus on the statute of conviction alone also helps to avoid embroiling courts in a dispute about how the parties or a judge or a jury in the state court proceedings applied definitional provisions or case law. *See Descamps*, 133 S. Ct. at 2288 (noting Sixth Amendment concerns that would arise if the predicate conviction inquiry "went beyond merely identifying a prior conviction.")

Mathis read too much into footnote 2 of *Descamps* and its seeming rejection of a means versus element distinction for purposes of applying the modified categorical approach. *Mathis*, 786 F.3d at 1074-75. *Descamps* never wavered from its "elements-centric" focus. *Descamps*, 133 S. Ct. at 2285. The opinion is replete with references to *elements* as the key to both the categorical and modified categorical approaches. *See, e.g.*, *Descamps*, 133 S. Ct. at 2285 (emphasizing that the modified categorical approach "retains the categorical approach's central feature: a focus on the elements of a crime.")

The *Descamps* majority's mention of "means" was in a footnote response to a dissent that had argued the court's prior cases employed the modified categorical approach to statutes that involved "means" rather than "elements." *Descamps*, 133 S. Ct. at 2285 n.2. The majority in *Descamps* responded that this was "news" to them, *id.*, and that, regardless, the focus remains on the statute of conviction and what it "lists." *Id.* The court's point was simply that inclusion of alternatives in the statute of conviction triggers a modified categorical inquiry to determine which of the alternative terms was the basis for conviction. The court did not purport to otherwise stray from the notion that crimes are defined by elements, not means, or that ACCA predicates must qualify as such based on their elements. *Descamps* gives this example of a divisible statute: "That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S. Ct. at 2281. That's exactly what the Iowa burglary statute in question here does not do. It

broadly makes "occupied structure" the necessary element, not the type of occupied structure. *See State v. Rooney*, 862 N.W.2d 367, 370 (Iowa 2015) (noting the jury was marshaled on the element of "occupied structure," and then given separate definitional instruction setting forth two alternative definitions of occupied structure). The separate definitional provision identifying the places that qualify as occupied structures gives meaning to and elucidates the burglary statute, much like case law functions, but it does not create distinct alternative elements or offenses. As such, it does not invite or permit application of the modified categorical approach to try and narrow the offense to fit generic burglary.

Definitions aren't elements, and they cannot turn indivisible elements into divisible ones. In *Descamps*, this Court rejected the notion that "implied" definitions for an indivisible "weapons" element could render that element divisible. 133 S. Ct. at 2290-91. The outcome should not be different for express definitions that are written by separate statute or case law.

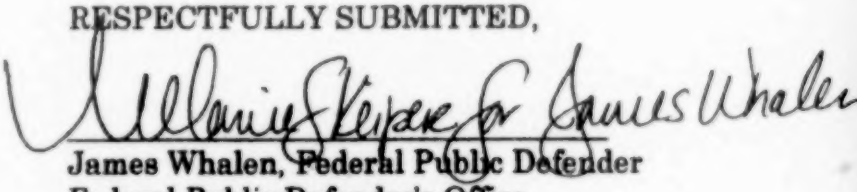
Iowa has alternative and varied definitions of its "occupied structure" element, but in the pure categorical sense, in the pure statutory sense, defendant's burglary convictions established only the illegal entry of an occupied structure, period. That is only as far as the statute of conviction goes. And because the "occupied structure" element sweeps more broadly then generic burglary, that should have been the end of the ACCA inquiry. *See Descamps*, 133 S. Ct. at 2285-86; *United States v. Simmons*, 782 F.3d 510, 516-17 (9th Cir. 2015); *United States v.*

Howard, 742 F.3d 1334, 1348-49 (11th Cir. 2014), *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013).

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

RESPECTFULLY SUBMITTED,



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APPENDIX

Decision of United States Court of Appeals for the Eighth Circuit

United States Court of Appeals
For the Eighth Circuit

No. 14-2396

United States of America

Plaintiff - Appellee

v.

Richard Mathis

Defendant - Appellant

Appeal from United States District Court
for the Southern District of Iowa - Davenport

Submitted: December 9, 2014
Filed: May, 12, 2015

Before LOKEN, BYE, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Richard Mathis was convicted for being a felon in possession of a firearm and received an enhanced sentence under the Armed Career Criminal Act (ACCA), which applies to felons guilty of possession of a firearm who have three prior violent felony

convictions. The district court[1] also imposed special conditions of supervised release usually reserved for convicted sex offenders. Mathis appeals his sentence and the special conditions of supervised release. We affirm.

I. *Background*

On February 15, 2013, a 15-year-old boy named K.G. went missing. While missing, the boy stayed at Mathis's house. K.G. alleged that, during this time, Mathis forcibly molested him. On February 25, 2013, police officers tracked K.G.'s cell phone to Mathis's house. Mathis's girlfriend, who also stayed at the house, answered the door and told officers that Mathis was not home and that she did not know K.G.'s whereabouts. She later admitted that she lied to the officers; in fact, Mathis, K.G., and two other young males were present in the house. Later that night, Mathis took K.G. to his grandmother's house. On March 3, 2013, K.G. disclosed Mathis's alleged sexual abuse to officers.

The officers obtained several warrants to search Mathis's residence. On March 8, 2013, they executed the warrants and found a loaded rifle and ammunition. The officers also found a cell phone with nearly 6,000 text messages on it. Many of the messages were between Mathis and young males whom he had met on Meetme.com, the same social networking site through which K.G. had met Mathis. Several of the text messages were sexually explicit. These text messages showed that Mathis had traveled far to bring some of the young males whom he met on Meetme.com back to his residence. Additionally, a memory card was recovered during the search, which contained a picture of a nude underage male. Investigators also questioned Mathis's girlfriend. She admitted that she lied to officers on their February 25th visit. Mathis's girlfriend also stated that she believed that Mathis was having sexual intercourse with the boys whom he routinely brought to his house. One of the other victims, an 18-

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[1]The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

year-old male, told the officers that Mathis asked him about masturbation, asked him about the size of his genitals, and made several sexually explicit comments.

Police arrested Mathis on March 8, 2013, at his place of employment. While in custody, Mathis admitted that he owned the rifle and ammunition. Mathis also freely admitted that the officers might find child pornography on his computer and that he had visited websites to view and visit with young-looking homosexual males.

Mathis was indicted for one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), to which he pleaded guilty on January 21, 2014, in accordance with a plea agreement.

At Mathis's sentencing hearing, the court first considered whether the ACCA (18 U.S.C. § 924(e)) applied to Mathis. If Mathis possessed three prior convictions for "violent felonies," the ACCA would impose a 15-year mandatory minimum sentence. *Id.* After extensive oral argument and consideration of the Supreme Court's and this court's precedent, the district court ultimately found that Mathis's five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally, the court found that the burglaries were violent felonies under the ACCA's residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis's prior conviction in Iowa for interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months' imprisonment with five years of supervised release.

As part of the supervised release, the court imposed special release conditions routinely applied to sex offenders. The court heard testimony from two law enforcement officers that detailed Mathis's interest in young males. In addition to the information pertaining to the instant offense, the officers also disclosed a similar investigation in 1990. Then, two missing young boys, after their recovery, told police that they had been staying in Mathis's trailer. Considering this testimony, even though Mathis had never been convicted of a sex crime, the court found that the conditions of supervised release were appropriate to protect the public from Mathis.

II. *Discussion*

Mathis argues on appeal that his prior convictions for second-degree burglary are not violent felonies under the ACCA. He also challenges the imposition of sex-offender-related special conditions of supervised release.

A. *Application of the ACCA*

Mathis first argues that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argues, led the district court to erroneously conclude that his five previous burglary convictions were violent felonies for ACCA purposes.[2]

We review de novo whether a prior state-court conviction constitutes a violent felony for ACCA purposes. *United States v. Pate*, 754 F.3d 550, 553–54 (8th Cir. 2014) (citation omitted). The ACCA enhances the sentences of those defendants found

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[2]Mathis does not appeal the district court's finding that his previous Iowa conviction for interference with official acts inflicting serious injury constitutes one of the three predicate violent felonies required to apply the ACCA. Consequently, we consider this issue abandoned on appeal and will not disturb this finding. *See United States v. Batts*, 758 F.3d 915, 916 n.2 (8th Cir. 2014) (an argument raised before the district court but not raised on appeal is considered abandoned).

guilty of being a felon in possession of a firearm that have three previous convictions for "violent felon[ies]." 18 U.S.C. § 924(e)(1). As defined by the statute, a violent felony is one that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is *burglary*, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B) (emphasis added). Accordingly, Mathis contends that none of his convictions for burglary in Iowa qualify as a "burglary" as contemplated in the ACCA.

In the typical case, we use the "categorical approach" to determine whether prior convictions amount to violent felonies. *See Descamps*, 133 S. Ct. at 2283. This approach requires courts to "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602 (1990) (footnote omitted). Thus, in cases where prior convictions are for one of the named offenses in § 924(e)(2)(B)(ii), we look only at the elements of the offense as defined by the state statute to discern whether the nature of the state crime fits within the generic definition of the crime considered by the federal statute. For burglary, the Court has defined the generic crime as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. Therefore, if the state statute is "narrower than the generic view," a conviction under such statute would qualify as a violent felony for ACCA purposes "because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.*

There are a "narrow range of cases," however, in which state statutes present the necessary elements for conviction in the alternative. *See Descamps*, 133 S. Ct. at 2283–84. These alternatives, as presented in the statute, lay out one set of elements that would fit within the generic crime and another set of elements that would not. *See id.*, 133 S. Ct. at 2283–84; *see also United States v. Howard*, 742 F.3d 1334, 1343 (11th Cir. 2014). These divisible statutes can thus be divided into alternative elements,

which may in some cases constitute violent felonies, but other times may not. When approaching divisible statutes, courts are allowed to go one step further than the categorical approach to apply the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283–84. This tool allows courts to examine certain documents (such as charging papers and jury instructions) to determine under which set of alternative elements the defendant was convicted. *Id.* at 2284–86. Courts can then use their findings to properly determine whether prior convictions are violent felonies. *Id.* at 2284.

In *Descamps*, the Court attempted to clarify divisibility, but as Justice Kennedy observed, this "dichotomy between divisible and indivisible state criminal statutes is not all that clear." *Id.* at 2293 (Kennedy, J., concurring). Applying *Taylor*, the Court proposed a hypothetical state burglary statute that otherwise conformed with generic burglary, but also swept more broadly by criminalizing the "'entry of an automobile as well as a building.'" *Id.* at 2284 (quoting *Taylor*, 495 U.S. at 602). The statute in *Taylor* was a divisible statute because it presented an alternative set of elements, one of which conformed with generic burglary—entry into a building—and one of which did not—entry into an automobile. When dealing with a divisible statute, courts can then use the modified categorical approach to glean from certain approved documents of which set of elements the defendant was prosecuted and found guilty.

The Court's hypothetical became reality in *Shepard v. United States*, 544 U.S. 13 (2005). *Shepard* dealt with the divisibility of a Massachusetts burglary statute that criminalized "entries into 'boats and cars' as well as buildings." *Descamps*, 133 S. Ct. at 2284 (citing *Shepard*, 544 U.S. at 17); *see also* Mass. Gen. Laws ch. 266, §§ 16, 18 (2000). "No one could know, just from looking at the statute, which version of the offense [the defendant] was convicted of" in his guilty plea. *Descamps*, 133 S. Ct. at 2284. Thus, the Court used the modified categorical approach. In doing so, the Court delineated the scope of the modified categorical approach: "It was not to determine 'what the defendant and state judge must have understood as the factual basis of the

prior plea,' but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense." *Id.* (quoting *Shepard*, 544 U.S. at 25).

Our court has also encountered state burglary statutes like the hypothetical in *Taylor* and the convicting statute in *Shepard*. In *United States v. Bell*, we used the modified categorical approach to determine which set of alternative elements the defendant was convicted for in his prior conviction under the Missouri second-degree burglary statute. 445 F.3d 1086, 1090–91 (8th Cir. 2006). Under the Missouri statute, "a person commits second-degree burglary when he 'knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.'" *Id.* at 1090 (quoting Mo. Rev. Stat. § 569.170). The term "inhabitable structure" was elsewhere defined in the statute to "include ships, airplanes, and vehicles." *Id.* (citing Mo. Rev. Stat. § 569.010(2)). Recognizing that this statute was precisely the kind that the Court considered in its hypothetical in *Taylor*, we relied upon portions of the defendant's presentence investigation report that were deemed admitted. *Id.* The report recorded that the defendant's prior conviction under the Missouri statute was for burgling a building. *Id.* Thus, we concluded that the defendant's "prior commercial burglary conviction was . . . a generic burglary under *Taylor* and therefore a crime of violence."[3] *Id.* at 1091.We see nothing from

---

[3]*Bell*'s decision was in the context of determining whether the defendant's prior second-degree burglary conviction was a "crime of violence" under U.S.S.G. § 2K2.1(a)(4)(A). The Guidelines make clear that the term "crime of violence" as used in § 2K2.1(a)(4)(A) "has the meaning given that term in §4B1.2(a)." *Id.* § 2K2.1 cmt. 1. Further, we have long held that the terms "'violent felony' and 'crime of violence' are virtually interchangeable in definition and interpretation." *United States v. Eason*, 643 F.3d 622, 624 n.2 (8th Cir. 2011) (citing *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008)). Thus, cases that analyze the term "crime of violence" in applying enhancements under §§ 2K2.1 and 4B1.1 of the Guidelines can be used to inform analysis of the term "violent felony" in ACCA cases, and vice versa. Consequently, *Bell*'s "crime of violence" determination is relevant to the current

subsequent Supreme Court opinions that overturn our application of the modified categorical approach in *Bell*.

Shepard and *Bell* control the instant appeal. Mathis was previously convicted five times in Iowa for second-degree burglary in violation of Iowa Code §§ 713.3 and 713.5.[4] In Iowa, burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (1989) (emphasis added). Second-degree burglary is a burglary "in or upon an *occupied structure*" in which no persons are present, the burglar "has possession of an explosive or incendiary device or material" or other dangerous weapon, "or a bodily injury results to any person." *Id.* § 713.5(1)(a) (emphasis added). Second-degree burglary can also be committed if a person is present when the burglary happens but the burglar does not have possession of any of the aforementioned items and there is no bodily injury to any person. *Id.* § 713.5(1)(b).[5]

"violent felony" discussion.

[4]Mathis's first conviction was in 1980 for second-degree burglary, in violation of Iowa Code § 713.3; the other four convictions came in 1991, when the second-degree burglary statute was found in § 713.5. Both parties acknowledge the burglary statute was amended in 1984; for simplicity, the parties have agreed to argue on the language as contained in the 1989 version of the statute, under which Mathis was convicted for the second through fifth burglaries.

[5]Iowa's statutes provide multiple means of committing second-degree burglary, including (1) perpetrating the burglary when someone is present in the place being burgled, (2) perpetrating the burglary when possessing certain items, or (3) if a bodily

Thus, a conviction of burglary, at first glance, seems to fit within generic burglary of "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. The Iowa statute, however, sweeps more broadly than generic burglary because the term "occupied structure" is defined elsewhere in the statute as:

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present.

Iowa Code § 702.12. Consequently, it is impossible to know from looking at the convicting statute which set of alternative elements Mathis was convicted of: a set of elements that conforms with generic burglary—entry into a "building" or "structure"—or a set of elements that does not—entry into a "land, water or air vehicle." The statute exhibits the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard* and *Bell*. As in the latter mentioned cases, the modified categorical approach is the proper tool to determine whether Mathis's prior convictions are "violent felonies."

Mathis argues against this conclusion by asserting that the convicting statute and definition of "occupied structure" do not present alternative elements, but instead

---

injury to any person occurs during the commission of the burglary. These alternative elements, however, are irrelevant to divisibility because these alternatives have no bearing on the statute's conformity to the generic burglary definition. "General divisibility . . . is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, a crime of violence." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013).

simply present different types of occupied structures that can be burgled. Therefore, "[t]he jurors need not all agree on whether" he burgled a building, a boat, or a car, "because the actual statute requires the jury to find only" that he burgled an occupied structure. *Descamps*, 133 S. Ct. at 2290. This argument amounts to the means/elements distinction that was explicitly rejected in *Descamps*. *Descamps* held that the Court's decisions in *Taylor*, *Shepard*, and *Johnson* "rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different . . . crimes,' not several different methods of committing one offense." *Id.* at 2285 n.2 (alterations in original) (quoting *Johnson*, 559 U.S. at 144). The Court then instructed that

> [w]hatever a statute lists (*whether elements or means*), the documents we approved in *Taylor* and *Shepard* . . would reflect the crime's elements. . . . When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. (emphasis added). The Court's instruction clarifies the distinction between elements and means in analyzing potentially divisible statutes.[6] In the present case, the

---

[6]We recognize the elements/means distinction is a matter that splits our sister circuits. *Compare United States v. Royal*, 731 F.3d 333 (4th Cir. 2013) ("Rather than alternative *elements*, then, 'offensive physical contact' and 'physical harm' are merely alternative *means* of satisfying a single element of the Maryland offense."), *and Howard*, 742 F.3d at 1348–49 (finding that a disjunctive "or" statement that listed alternative places that could be burgled were "illustrative examples" and not "alternative elements"), *and Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) ("To be clear, it is black-letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means. Thus, when a court encounters a statute that is written in the disjunctive (that is, with an 'or'), that fact alone cannot end the divisibility inquiry." (citation omitted)), *with United States v. Prater*, 766 F.3d 501, 510 (6th Cir. 2014) (finding a New York statute divisible when it listed several alternative places that could be burgled in a disjunctive "or" statement).

term "occupied structure" reflects various places for unlawful entry that the statute criminalizes by providing a disjunctive list of buildings that can be burgled under the statute.[7] Whether these amount to alternative elements or merely alternative means to fulfilling an element, the statute is divisible, and we must apply the modified categorical approach.

Upon examining the charging documents that correspond with Mathis's burglary convictions, Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a "building," we find that Mathis was convicted under the element of the Iowa burglary statute that

---

[7]We also acknowledge another split in our sister circuits that is relevant for this appeal: whether a court can consider a statute or subsection, outside of the convicting statute, that defines a term in the convicting statute. *Compare United States v. Hockenberry*, 730 F.3d 645, 669 (6th Cir. 2014) (consulting a different statute that defined the term "occupied structure" to determine the divisibility of a Pennsylvania burglary statute), *and United States v. Herrera-Alvarez*, 753 F.3d 132, 139–40 (5th Cir. 2014) (consulting a different statute that defined the term "dangerous weapon" to determine the divisibility of a Louisiana battery statute), *and United States v. Trent*, 767 F.3d 1046, 1056 (10th Cir. 2014) (consulting other statutes cross-referenced in a conspiracy statute to determine divisibility), *cert. denied*, No. 14-7762, 2015 WL 732162 (U.S. Feb. 23, 2015), *with United States v. Simmons*, — F.3d —, 2015 WL 1499310, at *4-5 (9th Cir. April 3, 2015) (declining to consult a separate statute that defined the term "custody" in a Hawaii escape statute).

Our case law allows such cross-referencing to definitions of defined terms outside the convicting statute. *See, e.g.*, *United States v. Martinez*, 756 F.3d 1092, 1095–96 (8th Cir. 2014) (finding that Ariz. Rev. Stat. § 13-3102(A) was divisible because of "the fourteen subsections of Ariz. Rev. Stat. § 13-3102(A) *and the numerous disjunctive definitions of the relevant terms* defined in Ariz. Rev. Stat. § 13-3101(A)." (emphasis added)); *Bell*, 445 F.3d at 1090 (consulting a separate section of the convicting statute for the definition of the term "inhabitable structure" in a divisibility determination).

conforms with generic burglary. When combining these two convictions with Mathis's conviction for interference with official acts inflicting serious injury, *see supra* n.2, we hold that Mathis has the requisite predicate "violent felonies" to be categorized as an armed career criminal under the ACCA.

B. *Sex-Offender-Related Special Conditions of Supervised Release*

Mathis next argues that the district court abused its discretion by imposing special conditions reserved for sex offenders because the conditions result in a greater deprivation of liberty than is reasonably necessary to fulfill the goals outlined in 18 U.S.C. § 3553(a).

"[T]his court reviews the terms and conditions of supervised release for abuse of discretion . . . ." *United States v. Schaefer*, 675 F.3d 1122, 1125 (8th Cir. 2012) (citation omitted). Generally, "[a] district court has broad discretion to impose special conditions of supervised release, so long as each condition complies with the requirements set forth in 18 U.S.C. § 3583(d)." *United States v. Morais*, 670 F.3d 889, 895 (8th Cir. 2012) (quotation and citation omitted). Such requirements mandate that special conditions are "reasonably related to the factors set forth in" § 3553(a), and that the conditions "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in" the same section. 18 U.S.C. 3583(d)(1)–(2).

We have previously upheld special conditions of supervised release applied to sex offenders even when the underlying conviction was not for a sex offense. *See United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010) (upholding sex-offender-related special conditions of supervised release for conviction of being a felon in possession of a firearm); *United States v. Smart*, 472 F.3d 556, 559 (8th Cir. 2006) (same). Both *Kelly* and *Smart*, however, involved defendants that had previously been convicted of sex crimes. The question is, then, if Mathis's previous conduct justifies the imposition of the special conditions.

The district court heard extensive testimony from two law enforcement officers concerning allegations of sexual abuse made by K.G.—which happened contemporaneously with the charged offense—and allegations of sexual abuse made by two male children in 1990. In addition, the presentence investigation report (PSR) detailed instances where Mathis was found to have violated his parole for previous offenses on two different occasions regarding inappropriate behavior with young males. First, Mathis was arrested for conducting lascivious acts with a child in 1986; several individuals alleged Mathis exhibited inappropriate behavior towards their young male children in connection with this arrest. Second, Mathis's parole was revoked in 1989 when allegations surfaced that he performed fellatio on an 11-year-old boy. Mathis did not contest these portions of the PSR, allowing the district court to "accept [the] undisputed portion[s] . . . as a finding of fact." *United States v. Lee*, 570 F.3d 979, 982 (8th Cir. 2009) (quotation and citation omitted). Further, sentencing courts are allowed to make "findings . . . based on any information other than materially false information." *Schaefer*, 675 F.3d at 1124.

Based on the wealth of evidence presented of Mathis's improper acts toward young males, we find no abuse of discretion in the district court's finding that sex-offender-related special conditions were appropriate to deter Mathis, to protect the public from Mathis, and to provide Mathis with correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(B)–(D).

III. *Conclusion*

For the reasons stated, we affirm Mathis's sentence under the ACCA and the district court's imposition of sex-offender-related special conditions of supervised release.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis Petitioner,

vs.

United States of America - Respondent.

PROOF OF SERVICE

I, James Whalen, a member of the Bar of this Court, hereby certify that on September 15, 2015, one copy of the Petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis in the above-entitled case were mailed by depositing them in a U.S. Postal Service Depository located at Des Moines, Iowa, first class postage prepaid addressed to counsel for the respondent:

Solicitor General of the United States
Room 5614, Department of Justice
10th Street and Constitution Avenue, NW
Washington, D.C. 20530.

I further certify that all parties required to be served have been served.

RESPECTFULLY SUBMITTED,

Melanie Kiefer for James Whalen

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

Richard Mathis - Petitioner,

vs.

United States of America - Respondent.

PROOF OF SERVICE

I, James Whalen, a member of the Bar of this Court, hereby certify that on September 15, 2015, one copy of the Petition for Writ of Certiorari and the Motion to Proceed in Forma Pauperis in the above-entitled case were mailed by depositing them in a U.S. Postal Service Depository located at Des Moines, Iowa, first class postage prepaid addressed to counsel for the respondent:

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September 15, 2015

VIA FEDERAL EXPRESS

Mr. Scott S. Harris
Clerk, U.S. Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

RE: *Richard Mathis v. United States*

Dear Mr. Harris:

Enclosed with this letter is an original Motion for Leave to Proceed in Forma Pauperis with attached Petition for Writ of Certiorari, and Proof of Service on behalf of Mr. Mathis, along with 10 copies. I have also enclosed an extra copy. Please file the documents in your court and return a file-stamped copy to me in the enclosed, self-addressed stamped envelope.

Please contact me if you have any questions. Thank you for your assistance.

Sincerely,

Melanie S. Keiper for James Whalen

James Whalen
Federal Public Defender

JFW/mlc
Enclosures
cc: Richard Mathis

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No. 15-6092

IN THE

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 15, 2015
CERTIORARI GRANTED JANUARY 19, 2016

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DOCKET ENTRIES
No. 14-2396 (8th Cir.)*

06/16/2014	CRIMINAL case docketed. ...
	* * *
07/10/2014	RECORD FILED—SEALED PSI REPORT, 1 volumes, ..., Comments: 1 volume, 3 copies of Sealed PSI Report, Sealed Judgment and Sealed Statement of Reasons, ...
07/10/2014	RECORD FILED—PLEA TRANSCRIPT, 1 volumes, ... Dt. of Proceeding/Hearing: 01/21/2014 ...
07/10/2014	RECORD FILED—SENTENCING TRANS, 1 volumes, ... Dt. of Proceeding/Hearing: 01/03/2014 ...
	* * *
07/23/2014	RECORD FILED—EXHIBITS, ... Comments: 1 envelope containing Defendant's Suppression hearing Exhibits A and B and Sentencing Exhibits A-P ...
	* * *
08/21/2014	BRIEF FILED—APPELLANT BRIEF filed by Mr. Richard Mathis. w/service 08/21/2014 , ... Appellee brief due on 09/11/2014. ...
08/21/2014	ADDENDUM of APPELLANT FILED by Appellant Mr. Richard

* Entries edited for brevity and clarity.

Mathis , w/service 08/21/2014 ...

* * *

09/10/2014 BRIEF FILED—APPELLEE BRIEF filed by United States of America, w/service 09/10/2014 , ... Richard Mathis's reply brief due 09/17/2014. ...

09/10/2014 ADDENDUM of APPELLEE FILED by Appellee United States of America , w/service 09/10/2014 ...

* * *

11/07/2014 SET FOR ARGUMENT—CASE PLACED ON CALENDAR—*for Argument in St. Paul on Tuesday, December 09, 2014.* To be heard before Judges James B. Loken, Kermit E. Bye and Lavenski R. Smith in Division I. ...

* * *

12/05/2014 28(j) citation filed by Appellant Mr. Richard Mathis w/service 12/05/2014—FOR CAL ...

12/05/2014 ARGUMENT STATUS CHANGED—Argument to No Argument ...

12/09/2014 CASE SUBMITTED On the briefs without oral argument (on calendar) before Judges James B. Loken, Kermit E. Bye, Lavenski R. Smith in St. Paul ...

05/06/2014 28(j) citation filed by Appellant Mr. Richard Mathis w/service 05/06/2015—FOR CAL ...

05/12/2015 OPINION FILED—THE COURT: James B. Loken, Kermit E. Bye and

	Lavenski R. Smith AUTHORING JUDGE: Lavenski R. Smith (PUBLISHED) ...
05/12/2015	JUDGMENT FILED—The judgment of the Originating Court is AFFIRMED in accordance with the opinion.. JAMES B. LOKEN, KERMIT E. BYE and LAVENSKI R. SMITH ...
05/26/2015	PETITION for enbanc rehearing and also for rehearing by panel filed by Appellant Mr. Richard Mathis w/service 05/26/2015 ...
06/23/2015	JUDGE ORDER: Denying ... petition for enbanc rehearing filed by Appellant Mr. Richard Mathis. The petition for panel rehearing is also denied. Judge Kelly did not participate in the consideration or decision of this matter. ... PUBLISHED ORDER. ...
06/30/2015	MANDATE ISSUED. ...

* * *

DOCKET ENTRIES
No. 13-cr-33 (S.D. Iowa)*

Date Filed	#	Docket Text
06/18/2013	1	SEALED INDICTMENT as to Richard Mathis on count one. ...
		* * *
06/18/2013		Case unsealed as to Richard Mathis. ...
		* * *
01/21/2014	44	PLEA AGREEMENT as to Richard Mathis. ...
		* * *
05/06/2014	55	SENTENCING MEMORANDUM/BRIEF by USA as to Richard Mathis (Attachments: # 1 Exhibit 1-6) ...
		* * *
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05/29/2014	58	SENTENCING MEMORANDUM/BRIEF by Richard Mathis
06/03/2014	59	Minute Entry for proceedings held before Judge John A. Jarvey: Sentencing held on 6/3/2014 for Richard Mathis. Count 1, Def't is sentenced

* Entries edited for brevity and clarity.

to the BOP for a term of 180 months on Count 1. The Def't will be placed on supervised release for five years for Count 1 of the Indictment. $100.00 Special Assessment. ...

06/03/2014	60	JUDGMENT IN A CRIMINAL CASE as to Richard Mathis. Count 1, Def't is sentenced to the BOP for a term of 180 months on Count 1. The Def't will be placed on supervised release for five years for Count 1 of the Indictment. $100.00 Special Assessment. Signed by Judge John A. Jarvey on 6/3/2014. ...

* * *

06/12/2014	64	NOTICE OF APPEAL by Richard Mathis re 60 Judgment. ...

* * *

06/16/2014	68	AMENDED JUDGMENT as to Richard Mathis,, Count 1, Def't is sentenced to the BOP for a term of 180 months on Count 1. The Def't will be placed on supervised release for five years for Count 1 of the Indictment. $100.00 Special Assessment. Signed by Judge John A. Jarvey on 6/16/2014. ...

* * *

06/30/2014	72	TRANSCRIPT of Proceedings as to Richard Mathis re 43 Change of Plea Hearing, held on 1-21-14 before Judge Jarvey. ...

06/30/2014	73	TRANSCRIPT of Proceedings as to Richard Mathis re 59 Sentencing, held on 6-3-14 before Judge Jarvey. ...

* * *

05/12/2015	76	OPINION/JUDGMENT of USCA as to Richard Mathis re 64 Notice of Appeal—Final Judgment (Attachments: # 1 Opinion, # 2 Judgment, # 3 Letter to West Publishing) ...
06/30/2015	77	MANDATE of USCA as to Richard Mathis ...

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-2396

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

RICHARD MATHIS,
Defendant-Appellant.

Appeal from United States District Court
for the Southern District of Iowa—Davenport

Submitted: December 9, 2014
Filed: May, 12, 2015

Before LOKEN, BYE, and SMITH, Circuit Judges.

SMITH, Circuit Judge.

Richard Mathis was convicted for being a felon in possession of a firearm and received an enhanced sentence under the Armed Career Criminal Act (ACCA), which applies to felons guilty of possession of a firearm who have three prior violent felony convictions. The district court[1] also imposed special conditions of supervised release usually reserved for convicted sex offenders. Mathis appeals his sentence and the special conditions of supervised release. We affirm.

---

[1] The Honorable John A. Jarvey, United States District Judge for the Southern District of Iowa.

I. *Background*

On February 15, 2013, a 15-year-old boy named K.G. went missing. While missing, the boy stayed at Mathis's house. K.G. alleged that, during this time, Mathis forcibly molested him. On February 25, 2013, police officers tracked K.G.'s cell phone to Mathis's house. Mathis's girlfriend, who also stayed at the house, answered the door and told officers that Mathis was not home and that she did not know K.G.'s whereabouts. She later admitted that she lied to the officers; in fact, Mathis, K.G., and two other young males were present in the house. Later that night, Mathis took K.G. to his grandmother's house. On March 3, 2013, K.G. disclosed Mathis's alleged sexual abuse to officers.

The officers obtained several warrants to search Mathis's residence. On March 8, 2013, they executed the warrants and found a loaded rifle and ammunition. The officers also found a cell phone with nearly 6,000 text messages on it. Many of the messages were between Mathis and young males whom he had met on Meetme.com, the same social networking site through which K.G. had met Mathis. Several of the text messages were sexually explicit. These text messages showed that Mathis had traveled far to bring some of the young males whom he met on Meetme.com back to his residence. Additionally, a memory card was recovered during the search, which contained a picture of a nude underage male. Investigators also questioned Mathis's girlfriend. She admitted that she lied to officers on their February 25th visit. Mathis's girlfriend also stated that she believed that Mathis was having sexual intercourse with the boys whom he routinely brought to his house. One of the other victims, an 18-year-old male, told the officers that Mathis asked him

about masturbation, asked him about the size of his genitals, and made several sexually explicit comments.

Police arrested Mathis on March 8, 2013, at his place of employment. While in custody, Mathis admitted that he owned the rifle and ammunition. Mathis also freely admitted that the officers might find child pornography on his computer and that he had visited websites to view and visit with young-looking homosexual males.

Mathis was indicted for one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(l), to which he pleaded guilty on January 21, 2014, in accordance with a plea agreement.

At Mathis's sentencing hearing, the court first considered whether the ACCA (18 U.S.C. § 924(e)) applied to Mathis. If Mathis possessed three prior convictions for "violent felonies," the ACCA would impose a 15-year mandatory minimum sentence. *Id.* After extensive oral argument and consideration of the Supreme Court's and this court's precedent, the district court ultimately found that Mathis's five burglary convictions in Iowa were violent felonies and justified sentencing under the ACCA. The court found that the Iowa burglary statutes in question, Iowa Code §§ 713.1 and 713.5, were divisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013). Under *Descamps*, the court believed it could use the modified categorical approach to determine the particular elements of the specific burglary provision under which Mathis was convicted. Additionally, the court found that the burglaries were violent felonies under the ACCA's residual clause because they were substantially similar to generic burglary and posed the same risk of harm to others. Finally, the court found Mathis's prior conviction in Iowa for

interference with official acts inflicting serious injury was also a violent felony for ACCA purposes. As a result of the ACCA enhancement, Mathis was sentenced to the mandatory minimum of 180 months' imprisonment with five years of supervised release.

As part of the supervised release, the court imposed special release conditions routinely applied to sex offenders. The court heard testimony from two law enforcement officers that detailed Mathis's interest in young males. In addition to the information pertaining to the instant offense, the officers also disclosed a similar investigation in 1990. Then, two missing young boys, after their recovery, told police that they had been staying in Mathis's trailer. Considering this testimony, even though Mathis had never been convicted of a sex crime, the court found that the conditions of supervised release were appropriate to protect the public from Mathis.

II. *Discussion*

Mathis argues on appeal that his prior convictions for second-degree burglary are not violent felonies under the ACCA. He also challenges the imposition of sex-offender-related special conditions of supervised release.

A. *Application of the ACCA*

Mathis first argues that the district court erred by finding that the Iowa burglary statute was divisible and by applying the modified categorical approach to determine the nature of his convictions. This error, Mathis argues, led the district court to erroneously

conclude that his five previous burglary convictions were violent felonies for ACCA purposes.[2]

We review de novo whether a prior state-court conviction constitutes a violent felony for ACCA purposes. *United States v. Pate*, 754 F.3d 550, 553-54 (8th Cir. 2014) (citation omitted). The ACCA enhances the sentences of those defendants found guilty of being a felon in possession of a firearm that have three previous convictions for "violent felon[ies]." 18 U.S.C. § 924(e)(1). As defined by the statute, a violent felony is one that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is *burglary*, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* § 924(e)(2)(B) (emphasis added). Accordingly, Mathis contends that none of his convictions for burglary in Iowa qualify as a "burglary" as contemplated in the ACCA.

In the typical case, we use the "categorical approach" to determine whether prior convictions amount to violent felonies. *See Descamps*, 133 S. Ct. at 2283. This approach requires courts to "look only to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 602 (1990) (footnote omitted). Thus, in cases where prior

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[2] Mathis does not appeal the district court's finding that his previous Iowa conviction for interference with official acts inflicting serious injury constitutes one of the three predicate violent felonies required to apply the ACCA. Consequently, we consider this issue abandoned on appeal and will not disturb this finding. *See United States v. Batts*, 758 F.3d 915, 916 n.2 (8th Cir. 2014) (an argument raised before the district court but not raised on appeal is considered abandoned).

convictions are for one of the named offenses in § 924(e)(2)(B)(ii), we look only at the elements of the offense as defined by the state statute to discern whether the nature of the state crime fits within the generic definition of the crime considered by the federal statute. For burglary, the Court has defined the generic crime as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599. Therefore, if the state statute is "narrower than the generic view," a conviction under such statute would qualify as a violent felony for ACCA purposes "because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.*

There are a "narrow range of cases," however, in which state statutes present the necessary elements for conviction in the alternative. *See Descamps*, 133 S. Ct. at 2283-84. These alternatives, as presented in the statute, lay out one set of elements that would fit within the generic crime and another set of elements that would not. *See id.*, 133 S. Ct. at 2283-84; *see also United States v. Howard*, 742 F.3d 1334, 1343 (11th Cir. 2014). These divisible statutes can thus be divided into alternative elements, which may in some cases constitute violent felonies, but other times may not. When approaching divisible statutes, courts are allowed to go one step further than the categorical approach to apply the "modified categorical approach." *Descamps*, 133 S. Ct. at 2283-84. This tool allows courts to examine certain documents (such as charging papers and jury instructions) to determine under which set of alternative elements the defendant was convicted. *Id.* at 2284-86. Courts can then use their findings to properly determine whether prior convictions are violent felonies. *Id.* at 2284.

In *Descamps*, the Court attempted to clarify divisibility, but as Justice Kennedy observed, this "dichotomy between divisible and indivisible state criminal statutes is not all that clear." *Id.* at 2293 (Kennedy, J., concurring). Applying *Taylor*, the Court proposed a hypothetical state burglary statute that otherwise conformed with generic burglary, but also swept more broadly by criminalizing the "'entry of an automobile as well as a building.'" *Id.* at 2284 (quoting *Taylor*, 495 U.S. at 602). The statute in *Taylor* was a divisible statute because it presented an alternative set of elements, one of which conformed with generic burglary—entry into a building—and one of which did not—entry into an automobile. When dealing with a divisible statute, courts can then use the modified categorical approach to glean from certain approved documents of which set of elements the defendant was prosecuted and found guilty.

The Court's hypothetical became reality in *Shepard v. United States*, 544 U.S. 13 (2005). *Shepard* dealt with the divisibility of a Massachusetts burglary statute that criminalized "entries into 'boats and cars' as well as buildings." *Descamps*, 133 S. Ct. at 2284 (citing *Shepard*, 544 U.S. at 17); *see also* Mass. Gen. Laws ch. 266, §§ 16, 18 (2000). "No one could know, just from looking at the statute, which version of the offense [the defendant] was convicted of" in his guilty plea. *Descamps*, 133 S. Ct. at 2284. Thus, the Court used the modified categorical approach. In doing so, the Court delineated the scope of the modified categorical approach: "It was not to determine 'what the defendant and state judge must have understood as the factual basis of the prior plea,' but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense." *Id.* (quoting *Shepard*, 544 U.S. at 25).

Our court has also encountered state burglary statutes like the hypothetical in *Taylor* and the convicting statute in *Shepard*. In *United States v. Bell*, we used the modified categorical approach to determine which set of alternative elements the defendant was convicted for in his prior conviction under the Missouri second-degree burglary statute. 445 F.3d 1086, 1090-91 (8th Cir. 2006). Under the Missouri statute, "a person commits second-degree burglary when he 'knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein.'" *Id.* at 1090 (quoting Mo. Rev. Stat. § 569.170). The term "inhabitable structure" was elsewhere defined in the statute to "include ships, airplanes, and vehicles." *Id.* (citing Mo. Rev. Stat. § 569.010(2)). Recognizing that this statute was precisely the kind that the Court considered in its hypothetical in *Taylor*, we relied upon portions of the defendant's presentence investigation report that were deemed admitted. *Id.* The report recorded that the defendant's prior conviction under the Missouri statute was for burgling a building. *Id.* Thus, we concluded that the defendant's "prior commercial burglary conviction was ... a generic burglary under *Taylor* and therefore a crime of violence."[3] *Id.* at 1091. We see nothing

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[3] *Bell*'s decision was in the context of determining whether the defendant's prior second-degree burglary conviction was a "crime of violence" under U.S.S.G. § 2K2.1(a)(4)(A). The Guidelines make clear that the term "crime of violence" as used in § 2K2.1(a)(4)(A) "has the meaning given that term in §4B1.2(a)." *Id.* § 2K2.1 cmt. 1. Further, we have long held that the terms "'violent felony' and 'crime of violence' are virtually interchangeable in definition and interpretation." *United States v. Eason*, 643 F.3d 622, 624 n.2 (8th Cir. 2011) (citing *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008)). Thus, cases that analyze the term "crime of violence" in applying enhancements under §§ 2K2.1

from subsequent Supreme Court opinions that overturn our application of the modified categorical approach in *Bell*.

Shepard and *Bell* control the instant appeal. Mathis was previously convicted five times in Iowa for second-degree burglary in violation of Iowa Code §§ 713.3 and 713.5.[4] In Iowa, burglary is defined as follows:

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an *occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

Iowa Code § 713.1 (1989) (emphasis added). Second-degree burglary is a burglary "in or upon an *occupied structure*" in which no persons are present, the burglar "has possession of an explosive or incendiary device or material" or other dangerous weapon, "or a bodily inju-

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and 4B1.1 of the Guidelines can be used to inform analysis of the term "violent felony" in ACCA cases, and vice versa. Consequently, *Bell*'s "crime of violence" determination is relevant to the current "violent felony" discussion.

[4] Mathis's first conviction was in 1980 for second-degree burglary, in violation of Iowa Code § 713.3; the other four convictions came in 1991, when the second-degree burglary statute was found in § 713.5. Both parties acknowledge the burglary statute was amended in 1984; for simplicity, the parties have agreed to argue on the language as contained in the 1989 version of the statute, under which Mathis was convicted for the second through fifth burglaries.

ry results to any person." *Id.* § 713.5(1)(a) (emphasis added). Second-degree burglary can also be committed if a person is present when the burglary happens but the burglar does not have possession of any of the aforementioned items and there is no bodily injury to any person. *Id.* § 713.5(1)(b).[5]

Thus, a conviction of burglary, at first glance, seems to fit within generic burglary of "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor*, 495 U.S. at 599. The Iowa statute, however, sweeps more broadly than generic burglary because the term "occupied structure" is defined elsewhere in the statute as:

> [A]ny building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a struc-

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[5] Iowa's statutes provide multiple means of committing second-degree burglary, including (1) perpetrating the burglary when someone is present in the place being burgled, (2) perpetrating the burglary when possessing certain items, or (3) if a bodily injury to any person occurs during the commission of the burglary. These alternative elements, however, are irrelevant to divisibility because these alternatives have no bearing on the statute's conformity to the generic burglary definition. "General divisibility ... is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, a crime of violence." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013).

> ture is an "occupied structure" whether or not a person is actually present.

Iowa Code § 702.12. Consequently, it is impossible to know from looking at the convicting statute which set of alternative elements Mathis was convicted of: a set of elements that conforms with generic burglary—entry into a "building" or "structure"—or a set of elements that does not—entry into "land, water or air vehicle." The statute exhibits the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard* and *Bell*. As in the latter mentioned cases, the modified categorical approach is the proper tool to determine whether Mathis's prior convictions are "violent felonies."

Mathis argues against this conclusion by asserting that the convicting statute and definition of "occupied structure" do not present alternative elements, but instead simply present different types of occupied structures that can be burgled. Therefore, "[t]he jurors need not all agree on whether" he burgled a building, a boat, or a car, "because the actual statute requires the jury to find only" that he burgled an occupied structure. *Descamps*, 133 S. Ct. at 2290. This argument amounts to the means/elements distinction that was explicitly rejected in *Descamps*. *Descamps* held that the Court's decisions in *Taylor*, *Shepard*, and *Johnson* "rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different ... crimes,' not several different methods of committing one offense." *Id.* at 2285 n.2 (alterations in original) (quoting *Johnson*, 559 U.S. at 144). The Court then instructed that

> [w]hatever a statute lists (*whether elements or means*), the documents we approved in *Taylor* and *Shepard* ... would reflect the crime's ele-

> ments. ... When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. (emphasis added). The Court's instruction clarifies the distinction between elements and means in analyzing potentially divisible statutes.[6] In the present case, the term "occupied structure" reflects various places for unlawful entry that the statute criminalizes by providing a disjunctive list of buildings that can be burgled under the statute.[7] Whether these amount to al-

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[6] We recognize the elements/means distinction is a matter that splits our sister circuits. *Compare United States v. Royal*, 731 F.3d 333 (4th Cir. 2013)("Rather than alternative *elements*, then, 'offensive physical contact' and 'physical harm' are merely alternative *means* of satisfying a single element of the Maryland offense."), *and Howard*, 742 F.3d at 1348-49 (finding that a disjunctive "or" statement that listed alternative places that could be burgled were "illustrative examples" and not "alternative elements"), *and Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) ("To be clear, it is black-letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means. Thus, when a court encounters a statute that is written in the disjunctive (that is, with an 'or'), that fact alone cannot end the divisibility inquiry." (citation omitted)), *with United States v. Prater*, 766 F.3d 501, 510 (6th Cir. 2014) (finding a New York statute divisible when it listed several alternative places that could be burgled in a disjunctive "or" statement).

[7] We also acknowledge another split in our sister circuits that is relevant for this appeal: whether a court can consider a statute or subsection, outside of the convicting statute, that defines a term in the convicting statute. *Compare United States v. Hockenberry*, 730 F.3d 645, 669 (6th Cir. 2014) (consulting a different statute that defined the term "occupied structure" to determine the divisibility of a Pennsylvania burglary statute), *and United States v. Herrera-Alvarez*, 753 F.3d 132, 139-40 (5th Cir. 2014) (consulting a different statute that defined the term "dangerous weapon" to determine the divisibility of a Louisiana battery statute), *and United States*

ternative elements or merely alternative means to fulfilling an element, the statute is divisible, and we must apply the modified categorical approach.

Upon examining the charging documents that correspond with Mathis's burglary convictions, Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a "building," we find that Mathis was convicted under the element of the Iowa burglary statute that conforms with generic burglary. When combining these two convictions with Mathis's conviction for interference with official acts inflicting serious injury, *see supra* n.2, we hold that Mathis has the requisite predicate "violent felonies" to be categorized as an armed career criminal under the ACCA.

B. *Sex-Offender-Related Special Conditions of Supervised Release*

Mathis next argues that the district court abused its discretion by imposing special conditions reserved

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v. Trent, 767 F.3d 1046, 1056 (10th Cir. 2014) (consulting other statutes cross-referenced in a conspiracy statute to determine divisibility), *cert. denied*, No. 14-7762, 2015 WL 732162 (U.S. Feb. 23, 2015), *with United States v. Simmons*, —F.3d—, 2015 WL 1499310, at *4-5 (9th Cir. April 3, 2015) (declining to consult a separate statute that defined the term "custody" in a Hawaii escape statute).

Our case law allows such cross-referencing to definitions of defined terms outside the convicting statute. *See, e.g., United States v. Martinez*, 756 F.3d 1092, 1095-96 (8th Cir. 2014) (finding that Ariz. Rev. Stat. § 13-3102(A) was divisible because of "the fourteen subsections of Ariz. Rev. Stat. § 13-3102(A) *and the numerous disjunctive definitions of the relevant terms* defined in Ariz. Rev. Stat. § 13-3101(A)." (emphasis added)); *Bell*, 445 F.3d at 1090 (consulting a separate section of the convicting statute for the definition of the term "inhabitable structure" in a divisibility determination).

for sex offenders because the conditions result in a greater deprivation of liberty than is reasonably necessary to fulfill the goals outlined in 18 U.S.C. § 3553(a).

"[T]his court reviews the terms and conditions of supervised release for abuse of discretion ...." *United States v. Schaefer*, 675 F.3d 1122, 1125 (8th Cir. 2012) (citation omitted). Generally, "[a] district court has broad discretion to impose special conditions of supervised release, so long as each condition complies with the requirements set forth in 18 U.S.C. § 3583(d)." *United States v. Morais*, 670 F.3d 889, 895 (8th Cir. 2012) (quotation and citation omitted). Such requirements mandate that special conditions are "reasonably related to the factors set forth in" § 3553(a), and that the conditions "involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in" the same section. 18 U.S.C. 3583(d)(l)-(2).

We have previously upheld special conditions of supervised release applied to sex offenders even when the underlying conviction was not for a sex offense. *See United States v. Kelly*, 625 F.3d 516, 519 (8th Cir. 2010) (upholding sex-offender-related special conditions of supervised release for conviction of being a felon in possession of a firearm); *United States v. Smart*, 472 F.3d 556, 559 (8th Cir. 2006) (same). Both *Kelly* and *Smart*, however, involved defendants that had previously been convicted of sex crimes. The question is, then, if Mathis's previous conduct justifies the imposition of the special conditions.

The district court heard extensive testimony from two law enforcement officers concerning allegations of sexual abuse made by K.G.—which happened contemporaneously with the charged offense—and allegations of sexual abuse made by two male children in 1990. In

addition, the presentence investigation report (PSR) detailed instances where Mathis was found to have violated his parole for previous offenses on two different occasions regarding inappropriate behavior with young males. First, Mathis was arrested for conducting lascivious acts with a child in 1986; several individuals alleged Mathis exhibited inappropriate behavior towards their young male children in connection with this arrest. Second, Mathis's parole was revoked in 1989 when allegations surfaced that he performed fellatio on an 11-year-old boy. Mathis did not contest these portions of the PSR, allowing the district court to "accept [the] undisputed portion[s] ... as a finding of fact." *United States v. Lee*, 570 F.3d 979, 982 (8th Cir. 2009) (quotation and citation omitted). Further, sentencing courts are allowed to make "findings ... based on any information other than materially false information." *Schaefer*, 675 F.3d at 1124.

Based on the wealth of evidence presented of Mathis's improper acts toward young males, we find no abuse of discretion in the district court's finding that sex-offender-related special conditions were appropriate to deter Mathis, to protect the public from Mathis, and to provide Mathis with correctional treatment. *See* 18 U.S.C. § 3553(a)(2)(B)-(D).

III. *Conclusion*

For the reasons stated, we affirm Mathis's sentence under the ACCA and the district court's imposition of sex-offender-related special conditions of supervised release.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-2396

UNITED STATES OF AMERICA,

Appellee,

v.

RICHARD MATHIS,

Appellant.

Appeal from United States District Court
for the Southern District of Iowa—Davenport
(3:13-cr-00033-JAJ-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Kelly did not participate in the consideration or decision of this matter.

June 23, 2015

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

Criminal No. 3:13-cr-33

UNITED STATES OF AMERICA,

Plaintiff,

v.

RICHARD MATHIS,

Defendant.

June 3, 2014

TRANSCRIPT OF PROCEEDINGS

* * *

[2] THE COURT: Please be seated. The record can reflect that we are here in the matter of United States of America versus Richard Mathis, it is Criminal Case 3:13-cr-33. He is before the Court for sentencing. He pled guilty on January 21st to Count 1 of the June 18, 2013, Indictment. Mr. Mathis is present, he is represented by Terry McAtee. The government is represented by John Keller.

In preparation for sentencing I have reviewed the Presentence Report in its entirety. I have also reviewed Sentencing Memoranda filed by both the government and the defendant.

There are two primary disputes before the Court today, whether he qualifies as an armed career criminal and the terms and conditions of supervised release.

* * *

THE COURT: I would hear your argument on the armed [3] career criminal.

MR. KELLER: Your Honor, the government does have some evidence to produce on—or to present on the conditions of supervised release.

THE COURT: We will do that after the armed career criminal argument.

MR. KELLER: Understood, Your Honor. As the Court is aware, the Armed Career Criminal Act provides for 15-year mandatory minimum penalty if the defendant who is convicted of being a felon in possession of a firearm, the offense to which Mr. Mathis has pled here, if that defendant has three or more prior convictions for offenses that are classified as violent felonies.

Here Mr. Mathis has four prior convictions for second degree burglary under Iowa law and he has a fifth conviction under an assault statute, an aggravated assault statute involving resisting a peace officer and inflicting serious bodily injury.

The Sentencing Memoranda I think identified the issue accurately. The issue is—well, it is a two-step analysis, but first are the burglary statutes that are at issue here divisible and the two versions of the burglary statutes that applied to Mr. Mathis when he was convicted are essentially the same, the first one included an additional category of areas that could be burglarized other than just occupied structures; [4] but the—that's the earlier statute and it sets out occupied structure or another area in the alternative. That's the classic example under Descamps of a divisible statute so then the Court would resort to the modified categor-

ical approach to see if the Court can determine under which alternative the defendant was convicted.

The court documents are clear, in each instance Mr. Mathis was convicted of burglary of either a garage or residence or a machine shed or a storage shed. There's no conviction on which the government is relying was Mr. Mathis convicted of burglarizing an automobile or a boat or something that wouldn't count.

The defense I believe would agree with me to this point, and then the defense argument is because occupied structure is defined separately in the Iowa Criminal Code, it is not—the burglary statute doesn't read it shall be unlawful for someone to enter a building, a boat, an automobile, or, you know, another structure, the statute refers specifically to occupied structure and then occupied structure is defined elsewhere in the statute or elsewhere in the Code.

The definition of occupied structure is any building, structure, appurtenance to buildings and structures, land, water, or air vehicle, or similar place adapted for overnight accommodation of persons or occupied by persons for the purpose of carrying on business or other activity therein or for the [5] storage or safekeeping of anything of value. That again is a list of different categories of places that would—that are occupied structures for the purposes of the statute, that is a list that is set out in the alternative, again that's a classic example of a divisible statute.

The defense points to this Howard case from the Eleventh Circuit in which the Court there said a statute that lists a non-exhaustive list of ways in which a statute could be violated is not the same thing as a statute that sets out a specific alternative element and to the extent that Howard is decided correctly, the

Court in Howard based its decision on the fact that the statutory definition at issue there gave a non-exhaustive, a non-all-inclusive list of things that would count for burglary in that case and so the Court said because it is a non-exhaustive list, it is not a set of discrete alternatives because you can have things that aren't even listed in the statute that would still count as occupied structures in that case.

Here that is not the definition. The definition isn't a list of examples, the definition is an occupied structure is any building, structure, et cetera, et cetera, and it sets out the exact alternatives separated by the word "or" which is exactly what the Supreme Court gave as an example in Descamps of a divisible statute.

The only distinction between this statute and the [6] statute given as an example in Descamps is that this statute refers first to occupied structure and then occupied structure is defined separately in the Code. If you took the definition of occupied structure and substituted that for the words occupied structure in the Iowa burglary statute, you would have the identical situation that the Court discussed in Descamps and that is a distinction without a difference and so it is the government's position that all of the secondary burglary offenses count.

Now, if the Court were to agree with the defense's position and take the position that these statutes are not divisible and so that they are categorically overbroad, then the Court would still have to proceed to the "otherwise clause" of the violent felony definition and determine whether the second degree burglary convictions fall within the "otherwise clause", otherwise presents a serious risk of injury, and the Eighth Circuit has already addressed this issue and held that, you

know, even if a burglary of a commercial building doesn't fall within the generic categorical definition of Taylor or a burglary of some other type of building that is not a residence, even if that doesn't fall under the generic definition of burglary, it still falls within the "otherwise clause" because you're presenting the same risk of harm, you are presenting the same risk of a violent confrontation I think is the exact language when you burglarize a vehicle or a boat or some other [7] building that would fall within the occupied structure definition so on that basis, even if the Court were to find that these offenses are not categorically violent felonies as generic burglaries, the Court should still find that they count under the "otherwise clause" and that was discussed in the Stymiest decision in the Eighth Circuit that we cited in the Sentencing Memorandum.

With regard—so that's the burglaries. The defendant does argue that because Mr. Mathis was sentenced for all the burglaries on the—well, for four of the five burglaries on the same day in '91 I believe it was, that those should not count as separate violations, but that only matters in the context of the Guidelines in calculating criminal history points. It doesn't matter under the violent felony analysis for armed career criminal. The offenses were committed on different days and the court document shows they were committed on different days, they were different victims, that doesn't—that doesn't disqualify any of the predicate offenses.

With regard to the interference with official acts offense, the provision under which Mr. Mathis was convicted, 719.1(2), he was convicted under the last sentence of that statute which reads, "If a person violates this subsection and uses or attempts to use a dangerous weapon or inflict serious injury to another, the person commits a class C felony," and the interference with

official acts statute, the statute reads, "A [8] person under the custody, control, or supervision of the Department of Corrections who knowingly resists, obstructs, or interferes with a correctional officer—and then gives some other examples of people that would qualify under the statute—in the performance of the person's official duties commits a serious misdemeanor."

The defense argues that under Begay this would not fall under the "otherwise clause" because this interference with official acts statute doesn't require purposeful enough conduct or doesn't have a mens rea requirement that requires intentional violent conduct, but the statute requires knowingly resisting, obstructing, or interfering with a correctional officer so that's intentional, knowing conduct, and then the specific provision under which Mr. Mathis was convicted also requires that he either used or attempted to use a dangerous weapon or inflicted serious injury to another and the Eighth Circuit has addressed a similar statute, 719.1(1), and held that the word "inflicts" suggests that force must be used and inflicting injury requires violent force so under Begay it satisfies the test and the statute qualifies under the "otherwise clause" of the violent felony.

The same analysis applies to the subsection that Mr. Mathis was convicted of or was convicted under and so that statute should also qualify as a violent felony, although the Court need not reach that issue necessarily because there are [9] five predicate burglaries that—or four predicate burglaries that could count in this case. That's the argument—that's the government's position with regard to the armed career criminal.

THE COURT: Mr. McAtee?

MR. McATEE: Thank you, Your Honor. Mr. Mathis is not an armed career criminal. The burglary statutes are—the convictions are set forth in Paragraphs 37, 49, 50, 51, and 52. Those convictions are not for violent felonies as that term is defined under 924(e)(2)(B). The Court is aware of the case law. Taylor was the original Supreme Court case which states that Sentencing Courts should generally use the categorical approach and under the categorical approach only the fact of conviction and the statutory definition of the prior offense are relevant.

A generic burglary under the Armed Career Criminal Act as set forth in the Descamps and other prior cases is an unlawful or unprivileged entry into or remaining in a building or structure with the intent to commit a crime.

THE COURT: All of those elements of a generic burglary have always been in the Iowa burglary statute so you say in your brief that because the burglary can be committed by entering, for example, a boat or a car, that it exceeds the bounds of a generic burglary, but I thought that's exactly what makes it a divisible statute and allows the Court to go to the modified categorical approach. That's what I don't understand.

[10] MR. McATEE: What I think is in Descamps, when they started talking in that opinion about divisibility versus indivisibility, and then in Howard is the only circuit case that I found that has addressed burglary statutes after Descamps, and that opinion answers that the government's position basically would amount to any kind of—a statute is nongeneric and like in this case, the government acknowledges it is broader

than the generic definition of burglary, you can go to the modified categorical approach.

THE COURT: No, no, no, Descamps specifically involved a situation where the California burglary statute didn't have that generic element of burglary of an unauthorized presence in the structure, meaning it could be used to punish mere shoplifting in a public place where you were allowed to come. That's why Descamps was indivisible.

Here, I can't find a single part of the generic burglary definition from Taylor that isn't present at least in the alternative in any Iowa burglary statute as it exists and that's the problem I am having with your argument.

MR. McATEE: The burglary statute though in Iowa requires breaking into or remaining in an occupied structure. Occupied structure is defined or the examples given as Mr. Keller points out are broader than that generic. The element though is an occupied structure. The element is not breaking into an automobile, breaking into a home, it is occupied [11] structure.

THE COURT: Structure is what makes it fall within the generic category of burglary.

MR. McATEE: Well, but if you look at the definition of occupied structure, it includes other things beyond what is in the generic definition. The reason why this argument is the stronger argument and why it is indivisible with regard to occupied structure, because that is the element and that is broader, it is not—again, the Iowa burglary statute is did you break into or remain in a burglary—or an occupied structure. Just because there's then illustrative examples given of what may constitute an occupied structure, that is before the

Howard opinion kicks in, that's not the same as alternative elements.

Alternative elements would be if it was under the burglary statute, it's a burglary to break into a car, a burglary to break into a home. It is not to break into an occupied structure and why this I believe is the correct interpretation, Descamps—the opinion goes out of its way to state that the key is the elements of the prior statute that was violated, not the facts of the case, and in looking—the question is in looking at the elements and the fact of conviction, did Mr. Mathis necessarily commit a generic burglary offense, and you can't say that under the Iowa statute. He did not necessarily looking at the elements commit a violent crime [12] and that's what Descamps says and that's where Howard gets that language that just giving examples is not alternative elements and that's why I think that's the appropriate interpretation of Descamps.

Now, I didn't find an Eighth Circuit opinion, I don't think they have ruled on this particular issue, but that is—that Howard opinion comes from Descamps' focus on strictly looking at the elements of the offense and by violating that, do you necessarily commit a violent crime and he didn't because occupied structure includes other things besides what is contained in the generic definition of burglary.

Mr. Keller's argument might have had more weight before Descamps. I don't think it does after Descamps and Howard is certainly in our favor and that is again from my reading of the cases a correct interpretation of Descamps and where Courts will go after that so the Court is not allowed to go to the modified categorical approach and under the categorical approach these are not generic burglaries under the Armed Career Crimi-

nal Act and we have addressed these other arguments, Your Honor.

Even under the modified categorical approach again we're—it is our position that the Court cannot go to that approach. Paragraphs 50 and 52 involve a storage shed and a machine shed, I am not aware of any cases which have held that—and the government doesn't cite any that those are violent [13] crimes.

With regard—

THE COURT: Why should they be treated any different than a garage which there are bunches of cases on?

MR. McATEE: I think what the argument is on the—I am not even sure garage would be still—I realize the current Eighth Circuit precedent is a garage in that Mathijssen case. That's based on prior precedent, but that is not categorically a crime of violence. We have just addressed that. I don't think it is anymore and I don't think the government is arguing a burglary statute is categorically a crime of violence under Iowa law.

But the argument has always been what is the likelihood someone else will be present. That's the old case law and so our argument here is a storage shed, a machine shed is further removed from that possibility. Again, under the current Eighth Circuit case law, under the modified categorical approach, I think that the Eighth Circuit would say a garage would be under Mathijssen. I am just not sure that's still valid precedent. It is the precedent at this point, I am not sure it withstands Descamps and the reasoning in Howard.

The "otherwise clause", we have talked about that. The case—well, the "otherwise clause" in Begay talks

about must be purposeful, violent, and aggressive, must pose a similar degree of risk of physical injury as the example crimes. Again, [14] it is our position that these are not generic burglary crimes so any of this prior case law is not—certainly question whether it is still precedent; but again, it is our position only the categorical approach can be employed here and under that approach these are not generic burglaries, therefore they are not violent crimes under the Armed Career Criminal Act.

We have also addressed the Paragraphs 49, 50, 51, and 52, that they were not committed on occasions different from one another, but the Court is aware of the law on that. These burglaries were all committed in less than a two-month period in Muscatine County back in 1990. They're similar offenses, no intervening arrest, and they were sentenced at the same time.

THE COURT: Intervening arrest, you know that comes from criminal history points. There's nothing in the plain language of the Armed Career Criminal Statute that says anything about that or any case either, right?

MR. McATEE: No, other than on the one case—that's right, it is in the Guidelines; but on the one case cited by the government, that opinion made note of the fact that there was one or two intervening arrests. That's—there's not a case that I found that said no intervening arrests means they were not committed on the occasions different from one another; but no, that is Guideline language. However, the case pointed out by the government does cite that there were one or maybe more intervening arrests.

[15] It is also our position that interference conviction is not a violent crime. The intent Mr. Keller talked

about was related to the interference, knowingly resists, obstructs, or interference with a correctional officer. It is not related to the inflicting serious injury to another. Again, the government points out, and we have also, Malloy requires that it must pose a similar degree of risk of physical injury to the example crimes.

It is our position this interference statute does not and also the intent to inflict injury is not a requirement so for those reasons, and we have also argued that in our brief, that is not a violent crime also so based on this argument, Your Honor, and the Descamps opinion and Howard and the interpretation of Descamps and Taylor and all the other Armed Career Criminal Act cases, it is our position Mr. Mathis is not an armed career criminal. Thank you.

THE COURT: Thank you. I find that he is an armed career criminal. The Iowa burglary statute as it existed on each of the occasions for which he was convicted is divisible as that term is used in Descamps. In each of these—the burglary statute has all of the elements of generic burglary as the Supreme Court decided it in the Taylor situation.

This would be a Descamps situation if, for example, the Iowa burglary statute said that it was illegal to enter real estate and real estate could include a lake, an open field with [16] unapproved structures. Here the statute specifically refers to occupied structure and occupied structure can be a house, a business, and it can also be a boat or a car and that's what makes it divisible and that's what allows the Court to use the modified categorical approach, look at judicially noticeable documents, and determine that in each case Mr. Mathis was charged and convicted with entering an occupied

structure to include the storage shed, machine shed, garage, or whatnot.

The Court would further find that in any event that these convictions qualify as violent felonies under the clause that permits their use where they otherwise involve conduct that presents serious potential risk of physical injury to another. I also find that the conviction at Paragraph 53 qualifies, and the Court relies on the Malloy decision in large part to make that finding.

These offenses were committed on occasions different from one another. There are several of them that have the same arrest date, but the intervening arrest is not a requirement of the plain language of the statute or any case law that is applicable here.

I would hear your evidence with respect to the terms of supervised release.

MR. KELLER: Thank you, Your Honor. I would also, although they were attached to the government's Sentencing Memorandum and are part of the record, I would offer [17] Government's Exhibits 1 through 6 which are the copies of the convictions to make sure the record is complete.

THE COURT: Mr. McAtee?

MR. McATEE: We'd object, Your Honor, on the basis of the objection it is our position that only the categorical approach can be employed here so based on that we'd object.

THE COURT: Objection is overruled. The exhibits attached to the government's brief are received.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA
V.
Richard Mathis

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 3:13-cr-00033-001
USM Number: 14205-030
Terence L. McAtee
Defendant's Attorney

Date of Original Judgment: 6/3/2014
(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☑ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☐ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☑ pleaded guilty to count(s) One of the indictment filed June 18, 2013
- ☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
- ☐ was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1), 924(a)(2), 924(e)	Felon in Possession of a Firearm	03/08/2013	One

☐ See additional count(s) on page 2

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

6/3/14
Date of Imposition of Judgment

Signature of Judge

John A. Jarvey, U.S. District Judge
Name of Judge Title of Judge

6/16/14

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
v1 Sheet 2 — Imprisonment

DEFENDANT: Richard Mathis
CASE NUMBER: 3:13-cr-00033-001

Judgment Page: 2 of 6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

180 months on Count One of the Indictment filed June 18, 2013

☑ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends the defendant is incarcerated at FCI Oxford, Wisconsin.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ ☐ a.m. ☐ p.m. on ____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before on ____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ____ to ____

a ____ with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By ____
DEPUTY UNITED STATES MARSHAL

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
sl Sheet 3 — Supervised Release

DEFENDANT: Richard Mathis
CASE NUMBER: 3:13-cr-00033-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
Five years on Count One of the Indictment filed June 18, 2013

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

☑ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☑ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation office;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcemnt agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall submit to a mental health evaluation. If treatment is recommended, the defendant shall participate in an approved treatment program and abide by all supplemental conditions of treatment. Participation may include inpatient/outpatient treatment and/or compliance with a medication regimen. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

The defendant shall participate in a sex offender treatment program, to include psychological testing and a polygraph examination, as directed by the U.S. Probation Officer. The defendant shall also abide by all supplemental conditions of sex offender treatment, to include abstaining from alcohol. Participation may include inpatient/outpatient treatment, if deemed necessary by the treatment provider. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment. Sex offender assessments and treatment shall be conducted by therapists and polygraph examiners approved by the U.S. Probation Office, who shall release all reports to the U.S. Probation Office. The results of a polygraph examination will not be used for the purpose of revocation of supervised release. If disclosure is required by mandatory reporting laws, polygraph results will be reported to appropriate treatment personnel, law enforcement, and related agencies with the approval of the Court. If polygraph results reveal possible new criminal behavior, this will be reported to the appropriate law enforcement and related agencies after obtaining approval from the Court.

The defendant shall reside, participate, and follow the rules of the residential reentry program, as directed by the U.S. Probation Officer, for up to 120 days. The residential reentry program is authorized to allow up to six hours of pass time per week for good conduct when the defendant becomes eligible in accordance with the residential reentry program standards.

The defendant shall not have any contact (personal, electronic, mail, or otherwise) with any child under the age of 18, including in employment, without the prior approval of the U.S. Probation Officer. If contact is approved, the defendant must comply with any conditions or limitations on this contact, as set forth by the U.S. Probation Officer. Incidental contact in the course of daily commercial transactions is permissible.

The defendant shall not view or possess any form of pornography or sexually-oriented material, correspond with anyone in the business of providing such material, or enter adult entertainment venues where pornography or erotica are the primary products for purchase or viewing.

The defendant shall not possess or use a computer or any other device with an internal, external, or wireless modem, without the prior approval of the U.S. Probation Officer. If computer use is approved, the defendant shall submit to unannounced examinations of all computer equipment, the installation of monitoring hardware and software, and the possible removal of such equipment for a more thorough inspection. If computer use for employment purposes is approved by the U.S. Probation Officer, the defendant shall permit third party disclosure to any employer or potential employer concerning any computer-related restrictions that are imposed upon the defendant.

The defendant shall submit to a search of his person, residence, adjacent structures, office or vehicle, conducted by a U.S. Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

DEFENDANT: Richard Mathis
CASE NUMBER: 3:13-cr-00033-001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$ 0.00	$ 0.00

☐ The determination of restitution is deferred until _____ An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS	$0.00	$0.00

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245C (Rev. 09/11) Amended Judgment in a Criminal Case
v1 Sheet 6 — Schedule of Payments

DEFENDANT: Richard Mathis
CASE NUMBER: 3:13-cr-00033-001

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 100.00 due immediately, balance due

☐ not later than ____ or
☑ in accordance ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal ____ ____ *(e.g., weekly, monthly, quarterly)* installments of $ ____ over a period of ____ *(e.g., months or years)*, to commence ____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ____ ____ *(e.g., weekly, monthly, quarterly)* installments of $ ____ over a period of ____ *(e.g., months or years)*, to commence ____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary payments are to be made to the Clerk's Office, U.S. District Court, P.O. Box 9344, Des Moines, IA. 50306-9344.
While on supervised release, you shall cooperate with the Probation Officer in developing a monthly payment plan consistent with a schedule of allowable expenses provided by the Probation Office.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

a .22 caliber rifle, Mossberg 142A and 1,024 rounds assorted ammunition, as outlined in the preliminary order of forfeiture issued on January 28, 2014.*

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,

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Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

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The defendant shall forfeit the defendant's interest in the following property to the United States:

a .22 caliber rifle, Mossberg 142A and 1,024 rounds assorted ammunition, as outlined in the preliminary order of forfeiture issued on January 28, 2014.*

ıyments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal,) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA

Criminal No. 3:13-cr-33

UNITED STATES OF AMERICA,

v.

RICHARD MATHIS,

Defendant.

[stamp omitted]

INDICTMENT
T. 18 U.S.C. § 922(g)(1)
T. 18 U.S.C. § 924(a)(2)
T. 18 U.S.C. § 924(d)
T. 18 U.S.C. § 924(e)
T. 28 U.S.C. § 2461(c)

THE GRAND JURY CHARGES:

COUNT 1

(Felon in Possession of a Firearm)

That on or about March 8, 2013, in the Southern District of Iowa, the defendant, RICHARD MATHIS, having been previously convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly possess a firearm, that is, a .22 caliber rifle, said firearm possessed in and affecting commerce.

This is a violation of Title 18, United States Code, Sections 922(g)(1), 924(a)(2), and 924(e).

THE GRAND JURY FINDS:

NOTICE OF FORFEITURE

That upon conviction for the offense alleged in Count 1 of this Indictment, the defendant, RICHARD MATHIS, shall forfeit to the United States, pursuant to Title 18, United States Code, Section 924(d), and Title 28, United States Code, Section 2461(c), all firearms, magazines, and ammunition involved in the commission of said offense, including, but not limited to, the firearm identified in Count 1 of this Indictment.

A TRUE BILL.

/s/
FOREPERSON

Nicholas A. Klinefeldt
United States Attorney

By: /s/
John D. Keller
Assistant United States Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Case No. 3:13-cr-33

UNITED STATES OF AMERICA,

v.

RICHARD MATHIS,

Defendant.

PLEA AGREEMENT

The United States of America (also referred to as "the Government") and RICHARD MATHIS, and Defendant's attorney, enter into this Plea Agreement.

A. CHARGES

1. Subject Offense. Defendant will plead guilty to Count 1 of the Indictment, that is, Felon in Possession of a Firearm, in violation of Title 18, United States Code, Sections 922(g), 924(a)(2), and 924(e). Defendant also agrees to forfeiture of the .22 caliber firearm and any ammunition as provided for in the Indictment.

2. No Charges to be Dismissed. There are no charges to be dismissed.

3. No Further Prosecution. The Government agrees that Defendant will not be charged in the Southern District of Iowa with any other federal criminal offense arising from or directly relating to this investigation. This paragraph and this Plea Agreement do not apply to (1) any criminal act occurring after the

date of this agreement, (2) any crime of violence as defined in 18 U.S.C. § 3156(a)(4) other than any felony under chapter 109A, 110, or 117 of the United States Code arising from this investigation, or (3) any criminal offense which Defendant did not fully disclose to law enforcement during Defendant's interviews pursuant to any proffer or other agreements with the United States.

B. MAXIMUM PENALTIES

4. Maximum and Mandatory Minimum Punishment. Defendant understands that the crime to which Defendant is pleading guilty carries a maximum sentence of up to 10 years in prison; a maximum fine of $250,000; and a maximum term of supervised release of 3 years. A mandatory special assessment of $100 per count also must be imposed by the sentencing court. Defendant understands that if the court determines at sentencing that he has three or more prior convictions for a serious drug offense or violent felony as defined in 18 U.S.C. § 924(e)(2), Defendant would be subject to a mandatory minimum term of imprisonment of 15 years up to a maximum term of imprisonment of life, a maximum fine of $250,000, and a maximum term of supervised release of 5 years. The mandatory special assessment of $100 would still be imposed. Defendant understands that the Court may not impose a sentence less than the mandatory minimum sentence unless the Government files a motion for substantial assistance under 18 U.S.C. § 3553(e) or unless the Court finds that Defendant qualifies for safety valve under 18 U.S.C. § 3553(f). No one has promised Defendant that Defendant will be eligible for a sentence of less than the mandatory minimum.

5. Supervised Release—Explained. Defendant understands that, during any period of supervised release or probation, Defendant will be under supervision and will be required to comply with certain conditions. If Defendant were to violate a condition of supervised release, Defendant could be sentenced up to 2 years in prison, without any credit for time previously served if the enllanced penalty provisions of 18 U.S.C. § 924(e)(2) do not apply and up to 5 years in prison, without any credit for time previously served if the enhanced penalty provisions of 18 U.S.C. § 924(e)(2) do apply.

6. Detention. Defendant agrees that Defendant will remain in custody following the completion of the entry of Defendant's guilty plea to await the imposition of sentence.

7. Stipulation to Prior Convictions. Defendant waives any required notice under 18 U.S.C. § 924(e) and stipulates to the following, non-exhaustive, list of prior felony convictions for purposes of determining whether he is subject to the enhanced penalty provisions of the Armed Career Criminal Act:

> That on or about March 6, 1981, Defendant was convicted of burglary 2nd degree for a burglary committed on or about November 26, 1980, in violation of Iowa Code, Sections 713.1 and 713.3, in the Iowa District Court in and for Muscatine County (Cr. No. 1083A-1280), a felony offense;
>
> That on or about May 12, 1986, Defendant was convicted of escape from custody in violation of Iowa Code Section 719.4(1), in the Iowa District Court in and for Muscatine County (Cr. No. 1663-486), a felony offense;

That on or about May 24, 1991, Defendant was convicted of burglary 2nd degree for a burglary committed on or about June 9, 1990, in violation of Iowa Code, Section 713.5, in the Iowa District Court in and for Muscatine County (Cr. No. 2174-191), a felony offense;

That on or about May 24, 1991, Defendant was convicted of burglary 2nd degree for a burglary committed on or about July 9, 1990, in violation of Iowa Code, Section 713.5, in the Iowa District Court in and for Muscatine County (Cr. No. 2179-291), a felony offense;

That on or about May 24, 1991, Defendant was convicted of burglary 2nd degree for a burglary committed on or about August 2, 1990, in violation of Iowa Code, Section 713.5, in the Iowa District Court in and for Muscatine County (Cr. No. 2181-291), a felony offense;

That on or about May 24, 1991, Defendant was convicted of burglary 2nd degree for a burglary committed on or about June 17, 1991, in violation of Iowa Code, Section 713.5, in the Iowa District Court in and for Muscatine County (Cr. No. 2178-291), a felony offense;

That on or about September 30, 1994, Defendant was convicted of interference with official acts—inflicting serious injury, in violation of Iowa Code, Section 719.1(2), in the Iowa District Court in and for Jones County (Cr. No. 660-1193), a felony offense.

C. NATURE OF THE OFFENSE—FACTUAL BASIS

8. Elements Understood. Defendant understands that to prove the offense alleged under Count 1 (Felon in Possession of a Firearm), the Government would be required to prove beyond a reasonable doubt the following elements:

(1) Defendant had been convicted of a crime punishable by imprisonment for a term exceeding one year;

(2) Defendant thereafter knowingly possessed a firearm; and

(3) The firearm was transported across a state line some time during or before Defendant's possession of it.

9. Elements Admitted. As a factual basis for this plea of guilty, Defendant admits the following:

(1) On March 8, 2013, law enforcement recovered a .22 caliber Mossberg rifle during the execution of a search warrant at Mathis's residence.

(2) On the same date Mathis was arrested at his place of employment and admitted to knowingly possessing the firearm recovered from his residence.

(3) Prior to March 8, 2013, Mathis had been convicted of multiple felony offenses, each punishable by imprisonment for a term exceeding one year.

(4) The .22 caliber Mossberg rifle was not manufactured in Iowa; the firearm was

transported across a state line some time before Mathis's possession of it.

10. Truthfulness of Factual Basis. Defendant acknowledges that the above statements are true. Defendant understands that, during the change of plea hearing, the judge and the prosecutor may ask Defendant questions under oath about the offense to which Defendant is pleading guilty, in the presence of Defendant's attorney. Defendant understands that Defendant must answer these questions truthfully, and that Defendant can be prosecuted for perjury if Defendant gives any false answers.

11. Venue. Defendant agrees that venue for this case is proper for the United States District Court for the Southern District of Iowa.

D. SENTENCING

12. Sentencing Guidelines. Defendant understands that Defendant's sentence will be determined by the Court after considering the advisory United States Sentencing Guidelines, together with other factors set forth by law. The Sentencing Guidelines establish a sentencing range based upon factors determined to be present in the case, which include, but are not limited to the following:

(a) the nature of the offenses to which Defendant is pleading guilty;

(b) the number of firearms possessed;

(c) whether the firearm was used in connection with another felony offense;

(d) the nature and extent of Defendant's criminal history (prior convictions);

(e) whether the defendant is an Armed Career Criminal pursuant to 18 U.S.C. § 924(e); and

(f) acceptance or lack of acceptance of responsibility.

Defendant understands that, under some circumstances, the Court may "depart" or "vary" from the Sentencing Guidelines and impose a sentence more severe or less severe than provided by the Guidelines, up to the maximum in the statute of conviction. Defendant has discussed the Sentencing Guidelines with Defendant's attorney.

13. Acceptance of Responsibility. The government agrees to recommend that Defendant receive credit for acceptance of responsibility under USSG § 3E1.1. The government reserves the right to oppose a reduction under § 3E1.1 if after the plea proceeding Defendant obstructs justice, fails to cooperate fully and truthfully with the United States Probation Office, attempts to withdraw Defendant's plea, or otherwise engages in conduct not consistent with acceptance of responsibility. If the base offense level is 16 or above, as determined by the Court, the government agrees that Defendant should receive a 3-level reduction, based on timely notification to the government of Defendant's intent to plead guilty.

14. Presentence Report. Defendant understands that the Court may defer a decision as to whether to accept this Plea Agreement until after a Presentence Report has been prepared by the United States Probation Office, and after Defendant's attorney and the Government have had an opportunity to review and challenge the Presentence Report. The parties are free

to provide all relevant information to the Probation Office for use in preparing a Presentence Report.

15. Evidence at Sentencing. The parties may make whatever comment and evidentiary offer they deem appropriate at the time of sentencing and entry of plea, provided that such offer or comment does not violate any other provision of this Plea Agreement. Nothing in this Plea Agreement restricts the right of Defendant or any victim to make an allocution statement, to the extent permitted under the Federal Rules of Criminal Procedure, nor does this Plea Agreement convey any rights to appear at proceedings or make statements that do not otherwise exist.

16. Sentence to be Decided by Judge—No Promises. This Plea Agreement is entered pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure. The government and the defendant jointly recommend that if the defendant is determined to be an Armed Career Criminal pursuant to 18 U.S.C. § 924(e), that the Court inpose the mandatory minimum fifteen year term of imprisonment. The parties also jointly recommend that if the defendant is not determined to be an Armed Career Criminal pursuant to 18 U.S.C. § 924(e), that the Court impose a sentence of not more than eighty-four months. Defendant understands that the final sentence, including the application of the Sentencing Guidelines and any upward or downward departures, is within the sole discretion of the sentencing judge, and that the sentencing judge is not required to accept any factual or legal stipulations agreed to by the parties. Any estimate of the possible sentence to be imposed, by a defense attorney or the Government, is only a prediction, and not a promise, and is not binding. Therefore, it is uncertain at this time what each Defendant's actual sentence will be.

17. No Right to Withdraw Plea. Defendant understands that Defendant will have no right to withdraw Defendant's plea if the sentence imposed, or the application of the Sentencing Guidelines, is other than what Defendant anticipated, or if the sentencing judge declines to follow the parties' recommendations.

E. FORFEITURE, FINES, COSTS, AND RESTITUTION

18. Forfeiture. Defendant agrees to forfeiture of the property identified in the Indictment, including the .22 caliber Mossberg rifle, and any ammunition seized in connection with the investigation of this offense. Defendant will execute any documents as directed by the Government to complete the forfeiture.

19. Waivers Regarding Forfeiture. Defendant waives all constitutional and statutory challenges in any manner (including direct appeal, habeas corpus, or any other means) to any forfeiture carried out in accordance with this Plea Agreement on any grounds. Defendant further agrees that the forfeiture provisions of this Plea Agreement are intended to, and will, survive Defendant notwithstanding the abatement of any underlying criminal conviction after execution of this Plea Agreement. The forfeitability of any particular property pursuant to this agreement shall be determined as if Defendant had survived and that determination shall be binding upon Defendant's heirs, successors and assigns until the agreed forfeiture, including any agreed money judgment amount, is collected in full.

20. Consent to Judgment of Forfeiture. Defendant agrees to waive all interest in asset subject to this Plea Agreement in any administrative or judicial forfeiture proceeding, whether criminal or civil, state or federal. Defendant agrees to consent to the entry of orders of

forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Defendant understands that the forfeiture of assets is part of the sentence that may be imposed in this case.

21. Fines and Costs. Issues relating to fines and/or costs of incarceration are not dealt with in this agreement, and the parties are free to espouse their respective positions at sentencing.

22. Special Assessment. Defendant agrees to pay the mandatory special assessment of $100 ($100 per count) at or before the time of sentencing, as required by 18 U.S.C. § 3013.

23. Restitution. Defendant agrees that the Court should impose an order of restitution for all relevant conduct in an amount to be determined by the Court; that such order of restitution shall be due and payable immediately; and that if Defendant is not able to make full payment immediately, Defendant shall cooperate with the United States Probation Office in establishing an appropriate payment plan, which shall be subject to the approval of the Court, and thereafter in making the required payments. Any such payment plan does not preclude the Government from utilizing any collections procedures pursuant to the Federal Debt Collections Act and including the Treasury offset program.

24. Financial Statement. Defendant agrees to complete truthfully and in full a financial statement provided by the U.S. Attorney's Office, and return the financial statement to the U.S. Attorney's Office within 30 days of the filing of this Plea Agreement.

F. LIMITED SCOPE OF AGREEMENT

25. Limited Scope of Agreement. This Plea Agreement does not limit, in any way, the right or ability of the Government to investigate or prosecute Defendant for crimes occurring outside the scope of this Plea Agreement. Additionally, this Plea Agreement does not preclude the Government from pursuing any civil or administrative matters against Defendant, including, but not limited to, civil tax matters and civil forfeiture which arise from, or are related to, the facts upon which this investigation is based.

26. Agreement Limited to Southern District of Iowa. This Plea Agreement is limited to the United States Attorney's Office for the Southern District of Iowa, and cannot bind any other federal, state or local prosecuting, administrative, or regulatory authorities.

G. WAIVER OF TRIAL, APPEAL AND POST-CONVICTION RIGHTS

27. Trial Rights Explained. Defendant understands that this guilty plea waives the right to:

(a) continue to plead not guilty and require the Government to prove the elements of the crime beyond a reasonable doubt;

(b) a speedy and public trial by jury, which must unanimously find Defendant guilty before there can be a conviction;

(c) the assistance of an attorney at all stages of trial and related proceedings, to be paid at government expense if Defendant cannot afford to hire an attorney;

(d) confront and cross-examine adverse witnesses;

(e) present evidence and to have witnesses testify on behalf of Defendant, including having the court issue subpoenas to compel witnesses to testify on Defendant's behalf;

(f) not testify or have any adverse inferences drawn from the failure to testify (although Defendant also has the right to testify, if Defendant so chooses); and

(g) if Defendant is convicted, the right to appeal, with the assistance of an attorney, to be paid at government expense if Defendant cannot afford to hire an attorney.

28. Waiver of Appeal and Post-Conviction Review. Defendant knowingly and expressly waives any and all rights to appeal Defendant's conviction in this case, including a waiver of all motions, defenses and objections which Defendant could assert to the charge(s) or to the court's entry of judgment against Defendant; except that both Defendant and the United States preserve the right to appeal any sentence imposed by the district court, to the extent that an appeal is authorized by law. Also, Defendant knowingly and expressly waives any and all rights to contest Defendant's conviction in any post-conviction proceedings, including any proceedings under 28 U.S.C. § 2255. These waivers are full and complete, except that they do not extend to the right to appeal or seek post-conviction relief based on grounds of ineffective assistance of counsel or prosecutorial misconduct not known to Defendant, or reasonably knowable, at the time of entering this Plea Agreement.

H. VOLUNTARINESS OF PLEA AND OPPORTUNITY TO CONSULT WITH COUNSEL

29. Voluntariness of Plea. Defendant represents that Defendant's decision to plead guilty is Defendant's own, voluntary decision, and that the following is true:

(a) Defendant has had a full opportunity to discuss all the facts and circumstances of this case with Defendant's attorney, and Defendant has a clear understanding of the charges and the consequences of this plea, including the maximum penalties provided by law.

(b) No one has made any promises or offered any rewards in return for this guilty plea, other than those contained in this written agreement.

(c) No one has threatened Defendant or Defendant's family to induce this guilty plea.

(d) Defendant is pleading guilty because in truth and in fact Defendant is guilty and for no other reason.

30. Consultation with Attorney. Defendant has discussed this case and this plea with Defendant's attorney and states that the following is true:

(a) Defendant states that Defendant is satisfied with the representation provided by Defendant's attorney.

(b) Defendant has no complaint about the time or attention Defendant's attorney has devoted to this case nor the advice the attorney has given.

(c) Although Defendant's attorney has given Defendant advice on this guilty plea, the decision to plead guilty is Defendant's own decision. Defendant's decision to enter this plea was made after full and careful thought, with the advice of Defendant's attorney, and with a full understanding of Defendant's rights, the facts and circumstances of the case, and the consequences of the plea.

I. GENERAL PROVISIONS

31. Entire Agreement. This Plea Agreement, and any attachments, is the entire agreement between the parties. Any modifications to this Plea Agreement must be in writing and signed by all parties.

32. Public Interest. The parties state this Plea Agreement is in the public interest and it takes into account the benefit to the public of a prompt and certain disposition of the case and furnishes adequate protection to the public interest and is in keeping with the gravity of the offense and promotes respect for the law.

33. Execution/Effective Date. This Plea Agreement does not become valid and binding until executed by each of the individuals (or their designated representatives) shown below.

J. SIGNATURES

34. Defendant. I have read all of this Plea Agreement and have discussed it with my attorney. I fully understand the Plea Agreement and accept and agree to it without reservation. I do this voluntarily and of my own free will. No promises have been made to me other than the promises in this Plea Agreement. I have not been threatened in any way to get me to enter into

this Plea Agreement. I am satisfied with the services of my attorney with regard to this Plea Agreement and other matters associated with this case. I am entering into this Plea Agreement and will enter my plea of guilty under this Agreement because I committed the crime to which I am pleading guilty. I know that I may ask my attorney and the judge any questions about this Plea Agreement, and about the rights that I am giving up, before entering into the plea of guilty.

01-21-14	/s/ Richard Mathis
Date	Richard Mathis

35. Defendant's Attorney. I have read this Plea Agreement and have discussed it in its entirety with my client. There is no Plea Agreement other than the agreement set forth in this writing. My client fully understands this Plea Agreement. I am satisfied my client is capable of entering into this Plea Agreement, and does so voluntarily of Defendant's own free will, with full knowledge of Defendant's legal rights, and without any coercion or compulsion. I have had full access to the Government's discovery materials, and I believe there is a factual basis for the plea. I concur with my client entering into this Plea Agreement and in entering a plea of guilty pursuant to the Plea Agreement.

1/21/14	/s/ Terence L. McAtee
Date	TERENCE L. MCATEE Federal Public Defender's Office 101 W. 2nd Street, Suite 401 Davenport, IA 52801-1815 TEL: 563/322-8931 FAX: 563/383-0052 terry_mcatee@fd.org

36. United States. The Government agrees to the terms of this Plea Agreement.

Nicholas A. Klinefeldt
United States Attorney

1/21/14
Date

/s/ John D. Keller
John D. Keller
Assistant U.S. Attorney
U.S. Courthouse
131 East 4th St.
Davenport, Iowa 52801
Telephone: 563-449-5432
Telefax: 563-449-5433
E-mail: john.keller@usdoj.gov

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA,

Plaintiff,

vs.

RICHARD ALLEN MATHIS and STEVEN MICHAEL McFADON,

Defendants

No. 1083-1280

TRIAL INFORMATION

Comes now Stephen J. Petersen as Prosecuting Attorney, and in the name and by the authority of the State of Iowa accuses

Richard Allen Mathis, 4811 Grandview Avenue, Muscatine, IA; and Steven Michael McFadon, 419 Locust, Muscatine, IA

of the crime of second degree burglary

committed as follows: The said Richard Allen Mathis and Steven Michael McFadon on or about November 26, 1980 in the County of Muscatine and State of Iowa, did unlawfully and willfully These men broke into an occupied structure and a place where something of value is kept, to-wit: the house and garage of Allen Harvey, Route 6, Box 615, Muscatine, IA, with the intent to commit theft therein

in violation of Sections 713.1 and 713.3 of the Iowa Criminal Code.

FILED
1980 DEC 30 PM 3:54
FLORENCE METZLER, CLERK
BY
DISTRICT COURT
MUSCATINE COUNTY, IOWA

A TRUE INFORMATION

Stephen J. Petersen
Prosecuting Attorney

"On the 30 day of December, 1980, I find that the evidence contained in the within Trial Information and minutes of evidence, if unexplained, would _____ warrant a conviction by the trial jury, and being satisfied from the showing made herein that this case should _____ be prosecuted by Trial Information the same is _____ approved.

Defendant is released on:

1. personal recognizance _____
2. appearance bond $_____
   a. unsecured _____
   b. secured _____
3. other _____
4. conditions previously set ___ X

GOVERNMENT EXHIBIT 1

R K

60

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

* * * * * * * * * * * * * * *

STATE OF IOWA,	)	
	)	
Plaintiff,	)	No. 1083A-1280
	)	
vs.	)	ORDER
	)	RE SENTENCE
RICHARD ALLEN MATHIS,	)	
	)	
Defendant.	)	

* * * * * * * * * * * * * * *

FILED
2013 MAR -8 PM 3:03
BY FLORENCE KETZLER, CLERK
MUSCATINE DISTRICT COURT
MUSCATINE COUNTY, IOWA

State of Iowa appears by S. J. Petersen County Attorney, and the defendant appears in person with his attorney, Jose Olvera. The Court having seen a copy of the presentence investigation states that he cannot go along with the plea agreement, and gives the defendant an opportunity to withdraw his plea of guilty to the charge of Burglary in the 2nd degree. Defendant declines to withdraw his plea of guilty, and the Court enters judgment accordingly Counsel state that they know of no reason why sentence should not be imposed at this time.

IT IS, THEREFORE, ORDERED:

That pursuant to defendant's plea of guilty to the charge of Burglary in the 2nd degree, contrary to Sections 713.1 and 713.3 of the 1979 Code of Iowa, and as provided by Section 902.3 and 902.9 of said Code, it is the judgment and sentence of the court that the defendant be, and he is hereby committed to the custody of Director, Division of Adult Corrections for a period of not to exceed ten (10) years and pay the costs of this action. He will receive credit on said sentence for any time spent in the Muscatine County Jail in connection with this case. The Mens Reformatory at Anamosa, Iowa, is designated as the reception center to which the defendant is to be delivered by the sheriff.

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA,	:	
	:	CRIMINAL NO. 2174-191
Plaintiff,	:	
	:	
vs.	:	TRIAL INFORMATION
	:	
RICHARD ALLEN MATHIS,	:	
	:	
Defendant.	:	

FILED
1998 FEB 12 P 1:44
DEPUTY CLERK
BY
DISTRICT COURT
MUSCATINE COUNTY, IOWA

COMES NOW, James Kivi as Prosecuting Attorney, and in the name and by the authority of the State of Iowa accuses RICHARD ALLEN MATHIS of the crime of Burglary in the Second Degree committed as follows:

The said RICHARD ALLEN MATHIS on or about the 9th day of June, 1998, in the County of Muscatine and State of Iowa did unlawfully and willfully break and enter a garage owned by Robert Drawbaugh with the intent to commit a theft therein in violation of section 713.5 of the Iowa Criminal Code.

A TRUE INFORMATION

James Kivi
Prosecuting Attorney

I have made a full and careful investigation of the facts upon which this information is based and have determined under the authority of section 13.4 of the Code of Iowa and pursuant to rule 5(1) of the Rules of Criminal Procedure that a criminal prosecution is warranted in this matter.

James Kivi
Assistant Attorney General

GOVERNMENT EXHIBIT 2

On the 12 day of Feb., 1991, I find that the evidence contained in the within Trial Information and Minutes of Evidence, if unexplained, would _____ warrant a conviction by the trial jury, and being satisfied from the showing made herein that this case should _____ be prosecuted by Trial Information the same is _____ approved.

_____ Clerk of Court shall issue an arrest warrant.

_____ Clerk of Court shall issue a summons for Defendant to Appear.

_____ Bond is set in the amount of $_____.

_____ Bond may be unsecured.

_____ Bond must be cash.

_____ 10% cash may be posted.

✓ Bond previously set shall continue.

_____ Defendant is released on personal recognizance.

JUDGE, 7th JUDICIAL DISTRICT
STATE OF IOWA

Name of Witnesses:

Robert Drawbaugh
Mark Wallace
C.J. Ryan
Larry Murdock

by	Year	COURT MINUTES
	91	Defendant appeared in person and with Atty. R. Hohenadel; State appeared by James Kivi. The Court is in receipt of a presentence investigation report which has been received and reviewed by counsel. Pursuant to the provisions of Section 713.5, the Code, and Sections 902.3 and 902.9 of the Iowa Code, defendant is hereby sentenced to serve a term of ten years confinement and is committed to the custody of the Director of the Iowa Department of Corrections. The Iowa Medical Classification Center at Oakdale, Iowa, is designated as the place of reception for defendant and the Sheriff of Muscatine County is directed to transfer defendant's temporary custody to that institution. Appeal bond is fixed at $10,000; defendant advised of his right to appeal. Defendant to pay costs of this action and court-appointed attorney fees. Defendant to recieve credit for time served in connection with this case. Code: 579.8Q R K. Stohr ,JUDGE

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA,	:	CRIMINAL NO. 2179-291
Plaintiff,	:	
vs.	:	TRIAL INFORMATION
RICHARD ALLEN MATHIS,	:	
Defendant.	:	

FILED
99 FEB 12 P 1:45
DONNA L. FLEMING, CLERK
BY
DISTRICT COURT
MUSCATINE CO., IOWA

COMES NOW, James Kivi as Prosecuting Attorney, and in the name and by the authority of the State of Iowa accuses RICHARD ALLEN MATHIS of the crime of Burglary in the Second Degree committed as follows:

The said RICHARD ALLEN MATHIS on or about the 9th day of July, 1998, in the County of Muscatine and State of Iowa did unlawfully and willfully break and enter a garage owned by Bob Minder with the intent to commit a theft therein in violation of section 713.5 of the Iowa Criminal Code.

A TRUE INFORMATION.

James Kivi
Prosecuting Attorney

I have made a full and careful investigation of the facts upon which this information is based and have determined under the authority of section 13.4 of the Code of Iowa and pursuant to rule 5(1) of the Rules of Criminal Procedure that a criminal prosecution is warranted in this matter.

James Kivi
Assistant Attorney General

GOVERNMENT EXHIBIT

On the 12 day of Feb., 1991, I find that the evidence contained in the within Trial Information and Minutes of Evidence, if unexplained, would _____ warrant a conviction by the trial jury, and being satisfied from the showing made herein that this case should _____ be prosecuted by Trial Information the same is _____ approved.

_____ Clerk of Court shall issue an arrest warrant.

_____ Clerk of Court shall issue a summons for Defendant to Appear.

_____ Bond is set in the amount of $_____.

_____ Bond may be unsecured.

_____ Bond must be cash.

_____ 10% cash may be posted.

✓ Bond previously set shall continue.

_____ Defendant is released on personal recognizance.

JUDGE, 7th JUDICIAL DISTRICT
STATE OF IOWA

Name of Witnesses:

Bob Minder
Mark Wallace
C.J. Ryan
Larry Murdock

Month	Day	Year	COURT MINUTES
May	24	91	Defendant appeared personally and with Atty. R. Hohenadel; State appeared by James Kivi. The Court is in receipt of a presentence investigation report, which has been reviewed by counsel. Pursuant to the provisions of Section 713.5, the Code, and Sections 902.3 add 902.9, the Code, defendant is hereby sentenced to serve a term of 10 years confinement and is committed to the custody of the Director of the Iowa Department of Corrections. The Iowa Medical & Classification Center at Oakdale, Iowa, is designated as the place of reception for defendant and the Sheriff of Muscatine County is directed to transfer defendant's temporary custody to that institution. Defendant to receive credit for time served in connection with this case. Defendant ordered to pay costs, attorney fees and and restitution. Appeal bond fixed at $10,000; defendant advised of his rights. Costs: 110.00 R.K. Stolz, JUDGE

J

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA,	:	CRIMINAL NO. FECR 018129
Plaintiff,	:	
vs.	:	TRIAL INFORMATION
RICHARD ALLEN MATHIS,	:	
Defendant.	:	

FILED
1998 FEB 12 P 1:45
CLERK DISTRICT COURT
MUSCATINE CO. IOWA
BY

COMES NOW, James Kivi as Prosecuting Attorney, and in the name and by the authority of the State of Iowa accuses RICHARD ALLEN MATHIS of the crime of Burglary in the Second Degree committed as follows:

The said RICHARD ALLEN MATHIS on or about the 2nd day of August, 1998 in the County of Muscatine and State of Iowa did unlawfully and willfully break and enter a machine shed belonging to Warren McIntire with the intent to commit a theft therein in violation of section 713.5 of the Iowa Criminal Code.

A TRUE INFORMATION

James Kivi
Prosecuting Attorney

I have made a full and careful investigation of the facts upon which this information is based and have determined under the authority of section 13.4 of the Code of Iowa and pursuant to rule 5(1) of the Rules of Criminal Procedure that a criminal prosecution is warranted in this matter.

James Kivi
Assistant Attorney General

GOVERNMENT EXHIBIT 4

On the 12 day of Feb., 1991, I find that the evidence contained in the within Trial Information and Minutes of Evidence, if unexplained, would _____ warrant a conviction by the trial jury, and being satisfied from the showing made herein that this case should _____ be prosecuted by Trial Information the same is _____ approved.

_____ Clerk of Court shall issue an arrest warrant.

_____ Clerk of Court shall issue a summons for Defendant to Appear.

_____ Bond is set in the amount of $_____.

_____ Bond may be unsecured.

_____ Bond must be cash.

_____ 10% cash may be posted.

✓ Bond previously set shall continue.

_____ Defendant is released on personal recognizance.

J L Burns
JUDGE, 7th JUDICIAL DISTRICT
STATE OF IOWA

Name of Witnesses:

Warren McIntire
Mark Wallace
C.J. Ryan
Larry Murdock

District Court Calendar, Muscatine County, Iowa Case No. 2181-291

Docket No. 15 Page 466

PARTIES	ATTORNEYS
STATE OF IOWA VS. Richard Allen Mathis	

CAUSE OF ACTION -

Month	Day	Year	COURT MINUTES
May	7,	1991	Trial in this matter commenced May 6, 1991, with the State represented at all times by Assistant Attorney General James Kivi and the Defendant present and represented by Attorney Randy Hohenadel. A jury was selected and sworn, testimony of both sides presented, closing summations given by the attorneys, instructions read by the Court, and deliberations commenced. The jury returned the following verdict on May 7, 1991: We, the jury, find the Defendant, Richard Allen Mathis, guilty of Burglary in the Second Degree in case no. 2181 (McIntire). The Court orders a presentence investigation. Sentencing is set for May 24, 1991, at 9 a.m. Bond remains as previously set.
May	24	91	Defendant appeared personally with Atty. R. Hohenadel; State appeared by James Kivi. The Court is in receipt of a presentence investigation report which has reviewed by counsel. Pursuant to the provisions of Section 713.5, the Code, and Sections 902.3 and 902.9, the Code, defendant is hereby sentenced to serve a term of ten years confinement and is committed to the custody of the Director of the Iowa Department of Corrections. The Iowa Medical and Classification Center at Oakdale, Iowa, is designated as the place of reception for defendant, and the Sheriff of Muscatine County is directed to transfer defendant's temporary custody to that institution. This sentence is to run consecutive to sentence imposed in Case No. 2179-291. Defendant to received credit for time served in connection with this case and to pay restitution, costs and attorney fees. Appeal bond fixed at $10,000; defendant advised of his right to appeal. Costs: 110.00 J R Burns JUDGE R K Stolte, JUDGE

IN THE IOWA DISTRICT COURT FOR MUSCATINE COUNTY

STATE OF IOWA,

Plaintiff,

vs.

RICHARD ALLEN MATHIS,

Defendant.

CRIMINAL NO. 2178-291

TRIAL INFORMATION

FILED
1991 FEB 12 P 1:45
DONALD E. [illegible], CLERK
BY
DEPUTY
DISTRICT COURT
MUSCATINE CO., IOWA

COMES NOW, James Kivi as Prosecuting Attorney, and in the name and by the authority of the State of Iowa accuses RICHARD ALLEN MATHIS of t e crime of Burglary in the Second Degree committed as follows:

The said RICHARD ALLEN MATHIS on or about the 17th day of June, 1991, in the County of Muscatine and State of Iowa did unlawfully and willfully break and enter a storage shed belonging to Bill Bartenhagen with the intention to commit a theft therein in violation of section 713.5 of the Iowa Criminal Code.

A TRUE INFORMATION

James Kivi
Prosecuting Attorney

I have made a full and careful investigation of the facts upon which this information is based and have determined under the authority of section 13.4 of the Code of Iowa and pursuant to rule 5(1) of the Rules of Criminal Procedure that a criminal prosecution is warranted in this matter.

James Kivi
Assistant Attorney General

GOVERNMENT EXHIBIT 5

On the 12 day of Feb., 1991, I find that the evidence contained in the within Trial Information and Minutes of Evidence, if unexplained, would _____ warrant a conviction by the trial jury, and being satisfied from the showing made herein that this case should _____ be prosecuted by Trial Information the same is _____ approved.

_____ Clerk of Court shall issue an arrest warrant.

_____ Clerk of Court shall issue a summons for Defendant to Appear.

_____ Bond is set in the amount of $_____.

_____ Bond may be unsecured.

_____ Bond must be cash.

_____ 10% cash may be posted.

✓ Bond previously set shall continue.

_____ Defendant is released on personal recognizance.

J L Burns
JUDGE, 7th JUDICIAL DISTRICT
STATE OF IOWA

Name of Witnesses:

Bill Bartenhagen
Mark Wallace
C.J. Ryan
Larry Murdock

Month	Day	Year	COURT MINUTES
May	24	91	Defendant appeared personally and with Atty. R. Hohenadel; State appeared by James Kivi. The Court is in receipt of a presentence investigation report which has been reviewed by counsel. Pursuant to the provisions of Section 713.5, the Code, and Sections 902.3 and 902.9, the Code, defendant is hereby sentenced to serve a term of 10 years confinement and is commited to the custody of the Director of the Iowa Department of Corrections. The Iowa Medical and Classification Center at Oakdale, Iowa, is designated as the place of reception for defendant and the Sheriff of Muscatine County is directed to transfer defendant's temporary custody to that institution. This sentence is to run consecutive to sentence in Case No. 2174-191. Defendant ordered to pay costs and court-appointed attorney fees. Appeal bond fixed at $10,000; defendant advised of his right to appeal. Defendant to receive credit for time served in Muscatine County Jail in connection with this case. Costs: 126.00 R.K. Stoby, JUDGE

Supreme Court, U.S.
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No. 15-6092

IN THE

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Whether a predicate prior conviction under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), must qualify as such under the elements of the offense simpliciter, without extending the modified categorical approach to separate statutory definitional provisions that merely establish the means by which referenced elements may be satisfied rather than stating alternative elements or versions of the offense.

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RICHARD MATHIS,
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INTRODUCTION

The Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), provides for increased sentences for defendants who have "three previous convictions ... for a violent felony," defined to include "burglary." In determining whether a prior conviction qualifies as a predicate "burglary" offense for purposes of ACCA, this Court employs a "categorical" approach comparing the elements of the prior offense to the elements of the "generic" burglary offense encompassed by ACCA. If the offense of conviction sweeps more broadly than the generic crime, it is not a "categorical" match and cannot serve as an ACCA predicate. Although this Court has recognized a "modified categorical approach," which permits a sentencing court to look to certain records from the defendant's prior conviction to ascertain the offense, the modified approach is available only when

the statute of conviction is "divisible," meaning that it "sets out one or more *elements of the offense* in the alternative," "and so effectively creates 'several different ... crimes.'" *Descamps* v. *United States*, 133 S. Ct. 2276, 2281, 2285 (2013) (emphasis added).

In this case, the court of appeals erroneously applied the modified categorical approach to convictions under an Iowa statute that lists "several different methods of committing one offense," rather than different elements. *Descamps*, 133 S. Ct. at 2285 n.2. The court of appeals did this because it misread two sentences in a footnote in *Descamps* so as to conclude that "the means/elements distinction ... was explicitly rejected" by this Court. JA17. The result was that Petitioner Richard Mathis's sentence was enhanced based on a judicial determination of the *facts* of his prior conduct, rather than the elements of the offense of *conviction*. That ruling is contrary to ACCA and everything this Court has instructed about the "limited function" of the modified approach. *Descamps*, 133 S. Ct. at 2283. It also revives the very constitutional, practical, and fairness concerns that led Congress and this Court to adopt a categorical approach to enhanced sentencing in the first place.

Once the correct analysis is conducted, it is plain that Mr. Mathis was convicted under an Iowa burglary law that defines a single offense and is accordingly indivisible. It is also undisputed that the Iowa burglary offense is broader than generic burglary. As a result, Mr. Mathis's prior burglary convictions cannot serve as ACCA predicate offenses. The judgment should accordingly be reversed and the case remanded for resentencing.

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (JA7) is reported at 786 F.3d 1068. The order denying rehearing (JA22) is unpublished but is available at 2015 U.S. App. LEXIS 10632. The amended judgment of the United States District Court for the Southern District of Iowa (JA36) is unreported.

JURISDICTION

The court of appeals entered judgment on May 12, 2015, and denied a timely petition for panel and en banc rehearing on June 23, 2015. JA3. The petition for a writ of certiorari was timely filed on September 15, 2015, and granted on January 19, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Armed Career Criminal Act, 18 U.S.C. § 924(e), and Iowa Code §§ 702.12 and 713.1 (1989) are reproduced in the Appendix to this brief.

STATEMENT

A. The Armed Career Criminal Act And The Categorical Approach

A defendant convicted of being a felon in possession of a firearm is ordinarily subject to a maximum sentence of ten years' imprisonment. 18 U.S.C. §§ 922(g), 924(a)(2). The Armed Career Criminal Act provides, however, that such a defendant is subject to a mandatory minimum sentence of 15 years in prison if the defendant "has three previous convictions ... for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(1).

ACCA defines "violent felony" to include "burglary," which this Court has interpreted to refer to the generic offense of burglary, namely, "'unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.'" *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013) (quoting *Taylor* v. *United States*, 495 U.S. 575, 599 (1990)).

In *Taylor*, this Court addressed how a sentencing court should determine whether a defendant's prior conviction counts as a predicate offense under ACCA. The Court concluded that ACCA "mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." 495 U.S. at 600. By focusing on the crime of *conviction*, rather than the facts of the offense *committed*, the Court gave effect to Congress's intent, avoided serious constitutional questions with respect to the Sixth Amendment right to a jury trial, and prevented the "daunting" "practical difficulties and potential unfairness of a factual approach." *Id.* at 600-602; *see also Descamps*, 133 S. Ct. at 2287-2289.

Under the categorical approach as established in *Taylor*, courts "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime .... The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps*, 133 S. Ct. at 2281; *see also Taylor*, 495 U.S. at 599 ("If the state statute is narrower than the generic view ... there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary."). If the statute is broader than the generic offense, however—meaning that a conviction may

be obtained without proof or admission of all elements of the generic offense—then the conviction does not categorically qualify as an ACCA predicate, "even if the defendant actually committed the offense in its generic form." *Descamps*, 133 S. Ct. at 2283.

Criminal statutes sometimes define multiple offenses in a single statutory section by listing their distinguishing elements in the alternative. Such statutes are called "divisible." (A statute that does "not contain[] alternative elements," and thus creates only a single offense, is called "indivisible." *Descamps*, 133 S. Ct. at 2281-2282.) If "at least one, but not all of th[e] crimes" alternatively defined by a divisible statute "matches the generic version" of the offense, the statute is inconclusive for ACCA purposes, and "a court needs a way to find out which the defendant was convicted of" in order to determine whether the offense of conviction conforms to the generic offense. *Id.* at 2285; *see also Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 n.4 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013); *Johnson* v. *United States*, 559 U.S. 133, 144 (2010); *Nijhawan* v. *Holder*, 557 U.S. 29, 35, 41 (2009). Sentencing courts use the "modified categorical approach" to do so. *Descamps*, 133 S. Ct. at 2281. Under that approach, "sentencing courts ... consult a limited class of documents"—often called *Shepard* documents, after *Shepard* v. *United States*, 544 U.S. 13 (2005)—"such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction" under a divisible statute. *Descamps*, 133 S. Ct. at 2281. If, after consulting these documents, the sentencing court is able to identify the crime of conviction, the court then does "what the categorical approach demands: compare the elements of the

crime of conviction ... with the elements of the generic crime." *Id.*

The "central feature" of the modified categorical approach, like the categorical approach itself, is "a focus on the elements, rather than the facts, of a crime." *Descamps*, 133 S. Ct. at 2285. In other words, a sentencing court may not consider *Shepard* documents to determine "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Id.* at 2288 (internal quotation marks omitted). Rather, the court "may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* at 2293. "The modified approach thus acts not as an exception, but instead as a tool" for implementing the categorical approach. *Id.* at 2285.

B. District Court Proceedings

In 2014, Petitioner Richard Mathis pleaded guilty to one count of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1).[1] JA9. The parties jointly recommended that, but for the potential enhancement of his sentence under ACCA, Mr. Mathis should be sentenced to no more than seven years' imprisonment. JA51. The government, however, contended that ACCA's mandatory minimum sentence of 15 years should apply. The government's invocation of ACCA turned

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[1] A loaded rifle and ammunition, which Mr. Mathis admitted were his, were found in his home during a police search that occurred following an accusation that Mr. Mathis had sexually abused a minor. JA8-9.

on prior convictions for burglary under Iowa law, one in 1981 and four in 1991.[2]

At the time of Mr. Mathis's 1991 burglary convictions, chapter 713 of the Iowa Criminal Code ("Burglary") provided:

> Any person, having intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters *an occupied structure*, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

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[2] The government also relied on a prior conviction for "interference with official acts." The court of appeals stated that the district court had found that this conviction "constitutes one of the three predicate violent felonies required to apply the ACCA," and declined to "disturb this finding" on the ground that Mr. Mathis had not appealed it. JA11 n.2. In fact, the district court made no such finding, and instead found that Mr. Mathis is an armed career criminal on the basis of the burglary convictions alone. JA34-35. Moreover, the government argued at sentencing that the "interference with official acts" conviction qualified as a predicate offense under ACCA's so-called residual clause, JA27-28, which covered crimes that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. § 924(e)(2)(B)(ii), and which has since been held unconstitutionally vague, *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). Mr. Mathis is entitled to the benefit of *Johnson* because it announced a new rule and his case is on direct review. *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004); *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987). Thus, there is significant doubt regarding whether Mr. Mathis's prior "interference with official acts" conviction qualifies as a predicate offense. In any event, the government's invocation of ACCA requires it to show that at least two, if not three, of Mr. Mathis's prior burglary convictions qualify as ACCA predicates.

Iowa Code § 713.1 (1989) (emphasis added).[3] A separate chapter of the Iowa Criminal Code ("Definitions") defined "occupied structure" to include "any building, structure, appurtenances to buildings and structures, *land, water or air vehicle, or similar place* adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12 (1989) (emphasis added).

The parties agreed that, because Iowa law defined "occupied structure" to include not only buildings and structures but also vehicles, it swept more broadly than the generic burglary offense. *See Shepard*, 544 U.S. at 15-16 (ACCA "makes burglary a violent felony only if committed in a building or enclosed space ('generic burglary'), not in a boat or motor vehicle").[4] Accordingly, there was no dispute that the fact of Mr. Mathis's prior burglary convictions was insufficient to establish those convictions as ACCA predicates.

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[3] The Iowa burglary statute was amended in 1984, but the change was immaterial to this case. Consistent with the parties' practice below, this brief refers to the 1989 version of the statute. *See* JA15 n.4.

[4] Iowa's burglary statute is also overbroad because it includes "appurtenances to buildings and structures." Iowa Code § 702.12. The Supreme Court of Iowa has "defined an 'appurtenance' broadly" to include curtilage, *State* v. *Pace*, 602 N.W.2d 764, 770 (Iowa 1999), such as driveways, *State* v. *Baker*, 560 N.W.2d 10, 13-14 (Iowa 1997), and fenced enclosures, *State* v. *Hill*, 449 N.W.2d 626, 627-628 (Iowa 1989). As this Court has explained, "the inclusion of curtilage takes ... burglary outside the definition of 'generic burglary' set forth in *Taylor*." *James* v. *United States*, 550 U.S. 192, 212 (2007).

The parties disagreed, however, about whether the sentencing court could use the modified categorical approach. The government argued that, because Iowa law defined "occupied structure" to encompass a list of alternatives, the burglary statute under which Mr. Mathis was convicted was divisible, such that the modified categorical approach could be used. The government submitted charging documents (trial informations) from Mr. Mathis's Iowa burglary prosecutions, but not plea agreements, plea colloquies, jury instructions, or verdict forms.[5] The Iowa charging documents accused Mr. Mathis of breaking into a "house and garage" (November 1980), JA60, a "garage" (June and July 1990), JA62; JA65, a "machine shed" (August 1990), JA68, and a "storage shed" (June 1991), JA71. Based on those factual allegations, the government argued that, in each case, Mr. Mathis had been convicted of burglarizing a "building," such that each prior conviction conformed to the generic burglary offense.

Mr. Mathis, by contrast, argued that the modified categorical approach was inapplicable because the Iowa burglary statute was indivisible. Mr. Mathis explained that a statute is divisible for ACCA purposes only if it sets out multiple offenses by listing alternative *elements*, one of which must be specifically charged by a prosecutor and agreed upon by a factfinder or admitted in a plea. Mr. Mathis argued that the relevant element of the Iowa burglary offense was that the place burglarized be an "occupied structure"—which is defined to sweep more broadly than the generic offense. The alternatives listed in the statutory definition of "occu-

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[5] The record indicates that one of Mr. Mathis's prior burglary convictions was based on a guilty plea and that another was based on a jury verdict. The record is silent as to the mechanism by which his other burglary convictions were obtained. JA60-73.

pied structure," he argued, were merely illustrative examples of different *means* by which that element could be satisfied, not themselves elements of which one had to be found by a jury or admitted in a plea for a defendant to be convicted.

The district court agreed with the government and sentenced Mr. Mathis to ACCA's mandatory minimum of 15 years' imprisonment. The court first ruled that, because the Iowa Code "specifically refers to occupied structure and occupied structure can be a house, a business, and it can also be a boat or a car," the Iowa burglary statute qualified as divisible. JA34. Believing that use of the modified categorical approach was therefore proper, the court consulted the trial informations drafted by the state prosecutors in Mr. Mathis's prior cases. The district court ruled that "in each case Mr. Mathis was charged and convicted with entering an occupied structure to include the storage shed, machine shed, garage, or whatnot." JA34-35. Based on that conclusion, the court ruled that each of Mr. Mathis's prior burglary convictions "has all of the elements of generic burglary." JA34.[6]

C. Court Of Appeals Proceedings

The United States Court of Appeals for the Eighth Circuit affirmed. The court agreed with the parties that the Iowa Code "sweeps more broadly than generic burglary because [of its definition of] the term 'occupied structure.'" JA16-17. It then concluded that, because that definition listed alternatives, some of which

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[6] Alternatively, the district court concluded that Mr. Mathis's prior burglary convictions qualified as violent felonies under ACCA's residual clause. JA35. Because the residual clause has since been held unconstitutional, *Johnson*, 135 S. Ct. 2551, the government no longer relies upon it. *See* U.S. Cert. Br. 3 n.1, 8 n.3.

"conform[] with generic burglary," the statute "exhibits the exact type of divisibility contemplated in *Taylor* and later solved in *Shepard*." JA17.

Although the court of appeals did not deny that a factfinder was not required to find (or a pleading defendant to admit) any particular "occupied structure" from the statutory list, and that the alternative "occupied structures" under Iowa law accordingly were simply different means of committing a single offense, the court rejected Mr. Mathis's argument that the statute was therefore indivisible. The court believed that the "means/elements distinction ... was explicitly rejected in *Descamps*." JA17. The court based that ruling on language in footnote 2 of *Descamps*, which it quoted as follows:

> "[w]hatever a statute lists (*whether elements or means*), the documents we approved in *Taylor* and *Shepard* ... would reflect the crime's elements. ... When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense."

JA17-18 (quoting *Descamps*, 133 S. Ct. at 2285 n.2) (emphasis and alterations by court of appeals). The court of appeals read this passage to establish that a statute that sets forth alternatives is invariably "divisible" and subject to the modified categorical approach, regardless of whether those alternatives "amount to alternative elements or merely alternative means to fulfilling an element." JA18-19.

Having ruled the modified categorical approach applicable, the court of appeals turned to the trial informations. Like the district court, the court of appeals concluded on the basis of the charging documents alone

that "Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions." JA19. Declaring that "a garage is clearly a 'building,'" the court "f[ou]nd" that both of those convictions were "under the element of the Iowa burglary statute that conforms with generic burglary." *Id.* The court accordingly affirmed Mr. Mathis's 15-year mandatory minimum sentence. *Id.* Mr. Mathis's petition for rehearing and rehearing en banc was denied. JA22.

Mr. Mathis petitioned for certiorari because the court of appeals' approach conflicted with that of other circuits—a division that has only deepened since then. *See United States* v. *Lockett*, 810 F.3d 1262 (11th Cir. 2016) (supporting Mr. Mathis's argument); *Almanza-Arenas* v. *Lynch*, 809 F.3d 515 (9th Cir. 2015) (en banc) (same). After the government acquiesced in certiorari, this Court granted the petition.

SUMMARY OF ARGUMENT

A sentencing court may use the modified categorical approach only when the defendant was convicted under a divisible statute—that is, a statute that defines multiple offenses because it contains alternative elements. Because the Iowa burglary statute identifies only alternative means of committing a single offense, it is indivisible. The district court and court of appeals thus erred in applying the modified categorical approach.

I. Under ACCA, Congress has permitted sentencing courts to determine whether a prior conviction qualifies as a predicate offense by "'look[ing] only to the statutory definitions'—*i.e.*, the elements—of a defendant's prior offenses, and not 'to the particular facts underlying those convictions.'" *Descamps* v. *United*

States, 133 S. Ct. 2276, 2283 (2013). Thus, courts may apply the modified approach only "when a statute lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" *Id.* at 2285. "The modified approach does not authorize a sentencing court to substitute ... a facts-based inquiry for an elements-based one." *Id.* at 2293.

The court of appeals nonetheless read footnote 2 of *Descamps* to approve use of the modified categorical approach whenever a statute explicitly identifies alternative means. That reading fundamentally misunderstands footnote 2 and the reasoning of *Descamps* as a whole, and contravenes the longstanding principles on which *Descamps* relied.

The elements of a crime are fundamentally different from the means by which a crime is committed. Whereas elements define the crime and thus must be specifically charged and found by the jury, means refer to how an element has been satisfied and thus are "amplifying but legally extraneous circumstances," which need not be charged or found by the jury. *Descamps*, 133 S. Ct. at 2288; *see Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion). Accordingly, when a statutory list of alternatives refers only to means of committing the offense rather than elements of the crime, the offense remains "indivisible," and "the categorical approach needs no help from its modified partner." *Descamps*, 133 S. Ct. at 2286.

Indeed, the Court in *Descamps* explicitly rejected the suggestion that the existence of alternative means allowed use of the modified categorical approach. If a sentencing court could compare the means of commission to the generic ACCA offense, the court would merely be asking whether a particular set of facts con-

formed to the generic ACCA offense, "[a]nd that is what [this Court] ha[s] expressly and repeatedly forbidden." 133 S. Ct. at 2291. Footnote 2 simply explained that "distinguishing between 'alternative elements' and 'alternative means'"—a prerequisite to application of the modified categorical approach—would be a practicable task for sentencing courts. *Id.* at 2285 n.2.

Besides contravening ACCA itself, the court of appeals' approach would lead to violations of the Sixth Amendment right to a jury trial. Because the factual finding that a defendant has three ACCA predicate convictions "increases the penalty for a crime beyond the prescribed statutory maximum," the Sixth Amendment right attaches, *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), and is violated unless the sentencing court bases its finding of a prior conviction solely on "those [facts] constituting *elements of the offense*," *Descamps*, 133 S. Ct. at 2288 (emphasis added).

Finally, the court of appeals' distinction between statutes that explicitly identify the means of commission and statutes that (like the one in *Descamps*) leave the means implicit only heightens the "daunting" "practical difficulties and potential unfairness" that led the Court to adopt the categorical approach in *Taylor* v. *United States*, 495 U.S. 575, 601 (1990). As with any other inquiry into the facts underlying a prior conviction, any inquiry into the means of commission will place an unwarranted burden on the sentencing court and risk leading the court to make inaccurate factual determinations. *Descamps*, 133 S. Ct. at 2289. The court of appeals' approach would also "deprive some defendants of the benefits of their negotiated plea deals," *id.*, lead to contradictory outcomes in indistinguishable cases, and complicate a defense attorney's strategic advice both in the original state criminal pro-

ceedings and in the subsequent federal proceedings in which ACCA could be applied.

II. Once the legal inquiry set forth in *Descamps* is correctly applied, it is plain that none of Mr. Mathis's burglary convictions qualifies as an ACCA predicate offense. Iowa's burglary statute—and specifically the term "occupied structure"—is not only overbroad (as all agree) but also indivisible, because the statutory list of alternative places identifies alternative means of satisfying a single, "broadly phrased ... element of place." *State* v. *Rooney*, 862 N.W.2d 367, 376 (Iowa 2015). Indeed, the Supreme Court of Iowa has held that the State may charge two different places alternatively and the jury need not agree on which place was burglarized. *State* v. *Duncan*, 312 N.W.2d 519, 522-523 (Iowa 1981). Furthermore, the final item in the statutory list is a "similar place," Iowa Code § 702.12, which confirms that the list collects illustrative means, not alternative elements. Mr. Mathis's prior Iowa burglary convictions thus do not conform to the generic burglary offense and do not qualify as predicate offenses under ACCA.

ARGUMENT

I. THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY WHERE THE STATUTE OF CONVICTION SETS FORTH ALTERNATIVE MEANS OF COMMITTING A SINGLE CRIME, RATHER THAN ALTERNATIVE ELEMENTS, WHICH DEFINE DIFFERENT CRIMES

A. ACCA Focuses On The Prior Conviction's Elements, Not Its Underlying Facts

ACCA provides a sentence enhancement for "a person who ... has three previous *convictions*" for specified violent felonies. 18 U.S.C. § 924(e)(1) (emphasis added); *see Taylor*, 495 U.S. at 600. And the Act de-

fines "violent felony" to include not only "any crime" that "is burglary," or other specified crimes, but also any crime that "has as an *element* the use ... of physical force." 18 U.S.C. § 924(e)(2)(B) (emphasis added). Given this context, the Court in *Taylor* interpreted the phrase "is burglary" to "refer[] to the *elements of the statute of conviction*, not to the facts of each defendant's conduct"—that is, not to what acts the person "has committed." 495 U.S. at 600-601 (emphasis added). In fact, the Court considered this "the only plausible interpretation of" ACCA's references to burglary and other predicate offenses. *Id.* at 602. Consequently, whether the sentencing court considers "the fact of conviction and the statutory definition of the prior offense," or considers certain record materials "beyond" those, the touchstone of the "formal categorical approach," the Court made clear, is whether "a jury was actually required to find all the elements of generic burglary." *Id.* at 600, 602.[7]

Since *Taylor*, the Court has consistently reaffirmed that an ACCA predicate conviction is identified by the legal elements of the offense, rather than the underlying facts in the defendant's particular case. For example, in *Shepard* v. *United States*, the Court noted ACCA's "language imposing the categorical approach, which refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes," and the need to "avoid[] subsequent evidentiary enquiries into the factual basis for the earlier conviction." 544 U.S. 13, 19-20 (2005). "[A]pplying *Tay-*

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[7] The Court's reading of ACCA was buttressed by the legislative history, which indicated that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor*, 495 U.S. at 600.

lor's categorical approach" in *James* v. *United States*, the Court remarked that it had "avoided any inquiry into the underlying facts of James' particular offense, and [had] looked solely to the elements of attempted burglary as defined by Florida law." 550 U.S. 192, 214 (2007).

Most recently in *Descamps*, the Court reiterated that, for ACCA purposes, "even if the defendant actually committed the offense in its generic form," "[t]he key ... is elements, not facts," and that the ultimate question under ACCA is whether "the jury [was] 'actually required to find all the elements of generic burglary.'" 133 S. Ct. at 2283-2284 (quoting *Taylor*, 495 U.S. at 602); *see also, e.g.*, *Descamps*, 133 S. Ct. at 2281 (under the "categorical approach[,] ... [t]he prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense"). Further, the Court explained: "The modified categorical approach ... retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.... All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates several different ... crimes." *Id.* at 2285 (internal quotation marks omitted); *see also id.* at 2286 (A "court may look to the [*Shepard*] documents to determine which of the statutory *offenses* ... formed the basis of the defendant's conviction." (emphasis added)). "The modified approach," the Court declared, "does not authorize a sentencing court to substitute ... a facts-based inquiry for an elements-based one." *Id.* at 2293.

B. Means Are Legally Extraneous Facts, Not Elements

Means and elements are fundamentally different. Elements define a crime by establishing what circumstances must exist and what actions a person must take to be found guilty of the crime. *See, e.g.*, *Richardson* v. *United States*, 526 U.S. 813, 817 (1999) ("[C]rimes are made up of factual elements."); *Black's Law Dictionary* (10th ed. 2014) (defining "elements of crime" as "[t]he constituent parts of a crime—usu. consisting of the actus reus, mens rea, and causation—that the prosecution must prove to sustain a conviction").

A defendant cannot be convicted of a crime unless the government has proven each element beyond a reasonable doubt. *Richardson*, 526 U.S. at 817; *Patterson* v. *New York*, 432 U.S. 197, 210 (1977). And "when a statute lists multiple, alternative elements," it "effectively creates several different ... crimes." *Descamps*, 133 S. Ct. at 2285. In that circumstance, the jury must find that a particular alternative element was proven beyond a reasonable doubt before convicting the defendant of the corresponding alternative crime. *Id.* at 2290; *Richardson*, 526 U.S. at 817.

Accordingly, "[a]n indictment must set forth each element of the crime that it charges." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998); *see also Hamling* v. *United States*, 418 U.S. 87, 117 (1974) (an indictment must "contain[] the elements of the offense charged" to be sufficient); *United States* v. *Hess*, 124 U.S. 483, 486 (1888) ("No essential element of the crime can be omitted without destroying the whole pleading."). And if a defendant is to be charged under a statute containing alternative elements, the prosecutor "must generally select the relevant element from [the]

list of alternatives" to specify in the indictment, *Descamps*, 133 S. Ct. at 2290, because each count of the indictment must allege only a single offense, *cf. Braverman* v. *United States*, 317 U.S. 49, 54 (1942). "[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient." *The Confiscation Cases*, 87 U.S. (20 Wall.) 92, 104 (1874).

Means, by contrast, refer to *how* a crime has been committed or an element satisfied. "Legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad* v. *Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion). As the Eleventh Circuit recently explained in rejecting the approach taken by the Eighth Circuit in this case, a statute's list of alternatives could simply give illustrative examples of multiple ways in which a person could commit a single offense. *See United States* v. *Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016) ("[I]llustrative examples are not alternative elements." (internal quotation marks omitted)). Or the list of alternatives might "create alternative definitions of indeterminate language." *Id.* For example, in *Schad*, the Court considered a first-degree murder statute that the Supreme Court of Arizona had interpreted as identifying felony-murder and premeditated murder as two "means of satisfying a single *mens rea* element." 501 U.S. at 637 (plurality opinion).

Thus, a statute listing alternative means still defines only a single crime. *See Schad*, 501 U.S. at 636 (plurality opinion) (a State may determine that "statutory alternatives are mere means of committing *a single offense*" (emphasis added)); *Sanabria* v. *United*

States, 437 U.S. 54, 66 n.20 (1978) ("A single offense should normally be charged in one count rather than several, even if different means of committing the offense are alleged."). Means may or may not be specified in the indictment, but unlike elements, they need not be—the indictment need contain only facts sufficient to fairly inform the defendant of the charge against him and to enable the defendant "to plead an acquittal or conviction [as a] bar of future prosecutions for the same offense." *Hamling*, 418 U.S. at 117.[8]

Where an indictment does specify the means of a charged crime, it might do so in the alternative, for instance if a coroner is unable to determine whether a victim was killed by burning or strangling. Because the specific means of the homicide need not be proved, alternative charging is permitted. *See Schad*, 501 U.S. at 631 (plurality opinion); *id.* at 650 (Scalia, J., concurring); Fed. R. Crim. P. 7(c)(1) ("A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means.").

Further, a jury need not agree on the means by which the defendant committed a crime, *i.e.*, on *how* any particular element was satisfied. *Schad*, 501 U.S. at 631-632 (plurality opinion) (jury need not agree on whether defendant committed first-degree murder through premeditation or felony murder, which Arizona law defined as alternative means). For example,

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[8] For example, this Court has held that an indictment for illegal reentry need not state the means by which a noncitizen attempted to reenter the United States, as long as the indictment sufficiently informs the defendant of the charge by specifying the time and place of the attempt. *United States* v. *Resendiz-Ponce*, 549 U.S. 102, 103-111 (2007).

> [w]here ... an element of robbery is force or the threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement—a disagreement about means—would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely, that the defendant had threatened force.

Richardson, 526 U.S. at 817. This rule applies not only to jury verdicts, but also to plea colloquies and written plea agreements. A guilty plea "is an admission of all the *elements* of a formal criminal charge," *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969) (emphasis added), but not of extraneous facts about the crime, even if they are included in the charging document, *Descamps*, 133 S. Ct. at 2288.

C. As The Court Recognized In *Descamps*, A Statute Listing Alternative Means Rather Than Alternative Elements Is Indivisible And Does Not Trigger The Modified Categorical Approach

Because means are legally extraneous facts, a criminal statute's listing of alternative means of committing an offense does not authorize use of the modified categorical approach for ACCA purposes. This conclusion follows directly from the basic principle—articulated in *Taylor*, *Shepard*, and *Descamps*—that ACCA predicate convictions are defined by their elements, not by the conduct that was the basis of the conviction.

Notably, the Court in *Descamps* explicitly rejected the suggestion that the existence of alternative means allowed use of the modified categorical approach. At issue in *Descamps* was whether the modified categori-

cal approach could be used in connection with an overbroad California statute that contained *no* list of alternatives. The Ninth Circuit had approved the use of the modified categorical approach because, it said, the California statute "creates an implied list of every means of commission that otherwise fits the definition of a given crime." 133 S. Ct. at 2289 (emphasis omitted). Reversing the Ninth Circuit, this Court explained that the modified categorical approach did not apply because "[t]he jurors need not all agree on whether the defendant used" a particular means to commit the crime (*e.g.*, "a gun or a knife or a tire iron"). *Id.* at 2290. "Indeed," this Court said, "accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach":

> If a sentencing court, as the Ninth Circuit holds, can compare each of those "implied ... means of commission" to the generic ACCA offense, ... then the categorical approach is at an end. At that point, the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic ACCA offense. And that is what we have expressly and repeatedly forbidden.

Id. at 2290-2291. As this passage demonstrates, "means" is simply another word for what this Court has called "a non-elemental fact," *id.* at 2289; the presence of alternative means of committing a single crime is accordingly not a valid basis for using the modified categorical approach.

In this case, however, the Eighth Circuit read footnote 2 of *Descamps* to limit that reasoning to statutes in which the different possible means of commission are implicit, *i.e.*, unstated, while otherwise approving use of

the modified categorical approach when (as here) alternative means are specifically recited in a state statute. That reading contravenes footnote 2, *Descamps* as a whole, and the longstanding principles on which *Descamps* relied.

Footnote 2 of *Descamps*, which responds to objections raised by the dissent, reinforces the distinction between alternative means and alternative elements, even where the alternatives are stated explicitly in the statute. Indeed, a principal disagreement between the Court and the dissent was whether the state laws in *Taylor*, *Shepard*, and *Johnson* "set out 'merely alternative means, not alternative elements' of an offense." 133 S. Ct. at 2285 n.2. The Court concluded that "[a]ll those decisions rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different ... crimes,' not several different methods of committing one offense." *Id.* The Court considered it important that its prior decisions finding statutes "divisible" were premised on the conclusion that those statutes' explicit lists of alternatives referred to elements, not means. That discussion would have been unnecessary and inexplicable if, as the court of appeals ruled here, a list of alternative means had the same effect under ACCA as a list of alternative elements.

The court of appeals justified its ruling by disregarding the beginning of footnote 2 and relying entirely on the footnote's final two sentences. That was erroneous not only because lower courts are not free to pick and choose which parts of this Court's decisions to heed, but also because the second half of footnote 2, even standing alone, does not mean what the court of appeals thought it did. That passage responded to the dissent's concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult." 133

S. Ct. at 2285 n.2. Rather than saying—as the court of appeals said in this case—that the distinction does not matter at all, the Court responded that ascertaining whether a statutory list of alternatives identifies means or elements would be practicable, and suggested that the *Shepard* documents might be useful for this limited and antecedent purpose, to the extent that they "would reflect the crime's *elements*." *Id.* (emphasis added); *see also id.* ("the court merely resorts to the approved documents and compares the *elements* revealed there to those of the generic offense" (emphasis added)).[9] Thus, even the two sentences relied upon by the court of appeals emphasize the importance of identifying the *elements* of the prior offense—not the *means* by which it was committed—because the categorical approach and its "modified version" are limited to comparing those *elements* to the generic offense.

Indeed, there is no reason why the ultimate question whether a prior conviction conforms to the generic offense should turn on whether alternative *means* are explicit or implicit in the statute of conviction. Explicit or implicit, means still are not elements, still do not define different offenses, and still refer only to factual circumstances that the prosecution was not required to prove and the jury was not required to find (or the de-

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[9] As is discussed further below (pp. 28-29, 36 n.14), given the variability of charging practices across jurisdictions and the frequent inscrutability of *Shepard* documents, the Court likely had in mind that such documents could be helpful, if at all, as a rule of exclusion, *i.e.*, to establish that the statute of conviction was *indivisible*, such as where the documents charge the alternatives in the disjunctive, thus confirming that the alternatives must be means, not elements. *See The Confiscation Cases*, 87 U.S. (20 Wall.) at 104; *Almanza-Arenas* v. *Lynch*, 809 F.3d 515, 524-525, 527 (9th Cir. 2015) (en banc) (confirming the court's determination that a statute is indivisible by examining *Shepard* documents).

fendant was not required to admit as part of a plea). *See, e.g., Schad*, 501 U.S. at 631-632 (plurality opinion) (jury need not agree on alternative means of committing first-degree murder, even where alternatives were explicitly listed in the statute). Using the modified categorical approach to ascertain the means that formed the basis of the conviction is no more relevant or appropriate under ACCA than a sentencing judge asking the defendant what he did, or holding a new trial to answer that question. *Descamps*, 133 S. Ct. at 2286 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant."). The presence of alternative means expressly identified in the statute does not make those inquiries any more appropriate.[10]

D. Using The Modified Categorical Approach To Analyze Convictions Under Statutes Listing Alternative Means Would Raise Serious Constitutional And Practical Difficulties

The court of appeals' use of the modified categorical approach in situations where a statute sets out a single offense with alternative means of commission, rather than multiple offenses created by alternative elements, improperly "turn[ed] an elements-based inquiry into an

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[10] The courts of appeals that have considered footnote 2 of *Descamps* in its entirety have agreed that the footnote does not eliminate the distinction between elements and means, but rather explains that distinguishing between them will not be difficult. *See Almanza-Arenas*, 809 F.3d at 526-528; *Rendon* v. *Holder*, 764 F.3d 1077, 1086 n.10 (9th Cir. 2014); *see also Omargharib* v. *Holder*, 775 F.3d 192, 201 (4th Cir. 2014) (Niemeyer, J., concurring). The courts that have come to the opposite conclusion have—like the Eighth Circuit below—generally only considered the footnote's final two sentences in isolation. *See United States* v. *Trent*, 767 F.3d 1046, 1060-1061 (10th Cir. 2014).

evidence-based one." *Descamps*, 133 S. Ct. at 2287. Besides contravening ACCA itself (as just explained), the court of appeals' approach raises serious constitutional questions and creates practical difficulties and potential unfairness—all reasons that have led the Court to reject a facts-based inquiry under ACCA.

1. The court of appeals' approach jeopardizes defendants' Sixth Amendment right to a jury trial

Concern about sentencing courts impinging upon defendants' Sixth Amendment rights has motivated the Court to construe ACCA to require a categorical, elements-based approach since *Taylor*. 495 U.S. at 601. The court of appeals' decision revives that very concern.

The Sixth Amendment requires that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. "Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction." *Descamps*, 133 S. Ct. at 2288.[11]

Critically, the Sixth Amendment exception for the fact of a prior conviction allows a sentence enhance-

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[11] Determining whether a prior conviction qualifies as an ACCA predicate also raises Sixth Amendment concerns because it increases the mandatory *minimum* sentence. *Alleyne* v. *United States*, 133 S. Ct. 2151, 2155 (2013) ("any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury").

ment only on the basis of the *elements* of the prior conviction, because "the only facts the court can be sure the jury ... found," or the defendant admitted by plea, "are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 133 S. Ct. at 2288. Thus, in *Descamps*, the Court held that the lower court had erred "when [it] enhanced Descamps' sentence, based on his supposed acquiescence to a prosecutorial statement ... irrelevant to the crime charged," *i.e.*, a "non-elemental fact." *Id.* at 2288-2289. Doing so "extend[s] judicial factfinding beyond the recognition of a prior conviction," which cannot be reconciled with the Sixth Amendment. *Id.* at 2288; *cf. James*, 550 U.S. at 214 (by "avoid[ing] any inquiry into the underlying facts of James' particular offense, and ... look[ing] solely to the elements of attempted burglary as defined by Florida law," the categorical approach "raises no Sixth Amendment issue").

Descamps' constitutional analysis has equal force regardless of whether the means of committing the offense are implied by the statute (as in *Descamps*) or expressly stated (as here). Either way, the means is a "non-elemental fact," an "amplifying but legally extraneous circumstance[]," and a sentencing court commits constitutional error by enhancing a sentence beyond the statutory maximum on the basis of a fact that *it* has found. 133 S. Ct. at 2288-2289.

2. The court of appeals' approach raises serious practical and fairness concerns

In *Taylor*, this Court also noted the advantage of the categorical approach in avoiding the "daunting" "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 601; *see also*

Descamps, 133 S. Ct. at 2289. The court of appeals' approach revives those concerns as well.

Like any other inquiry into the facts underlying a conviction, inquiry into the means of commission will often have a high cost and a low return. On the one hand, substantial resources will have to be expended "examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 133 S. Ct. at 2289. On the other hand, "[t]he meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong." *Id.* That is because (as noted above) charging instruments, jury verdicts, and plea agreements need not specify particular means of commission, and when such documents do specify means, defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Id.*; *see also id.* at 2293 (Kennedy, J., concurring) ("[C]ertain facts in the documents approved for judicial examination in *Shepard* ... may go uncontested because they do not alter the sentencing consequences of the crime[.]").

This case vividly illustrates the danger of using such documents to qualify a defendant for an ACCA enhancement. The only potentially relevant *Shepard* documents in the record relating to Mr. Mathis's prior burglary convictions are *charging* documents drafted by state prosecutors. No record materials demonstrate that a factfinder ever found or Mr. Mathis ever assented to the facts they allege. Certainly without "records made or used in adjudicating guilt"—jury instructions, verdict forms, plea agreements, transcripts of plea colloquies—and sometimes even with such records, the

charging documents cannot meet "*Taylor*'s demand for certainty when identifying a generic offense." *Shepard*, 544 U.S. at 21; *see Taylor*, 495 U.S. at 602 (prior conviction qualifies as ACCA predicate if "the charging paper *and jury instructions* actually required the jury to find all the elements of generic burglary in order to convict the defendant" (emphasis added)). The charging documents from Mr. Mathis's prior cases are especially prone to being misleading or inaccurate because Iowa law allows the State to amend the charges before and during trial, Iowa Ct. R. 2.4(8)(a); *see also id.* at 2.5(5), and—at the time of Mr. Mathis's first burglary conviction—even after trial, *State* v. *Berney*, 378 N.W.2d 915, 918-919 (Iowa 1985), *overruled by State* v. *Bruce*, 795 N.W.2d 1 (Iowa 2011). Iowa also allows *Alford* pleas, which would have permitted Mr. Mathis to plead guilty without admitting the facts underlying the crime. *See State* v. *Klawonn*, 609 N.W.2d 515, 520 (Iowa 2000) ("We first recognized the *Alford* plea in *Young* v. *Brewer*, 190 N.W.2d 434, 438 (Iowa 1971)."). Thus, the *Shepard* documents marshaled by the government in this case offer no assurance about the facts underlying Mr. Mathis's burglary convictions and, more importantly, do not confirm that Mr. Mathis was "necessarily" convicted based on "facts equating to generic burglary." *Shepard*, 544 U.S. at 24.

"Still worse, the [court of appeals'] approach will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 133 S. Ct. at 2289. This Court has recognized that a facts-based approach would invite the possibility of a defendant "plead[ing] guilty to a less serious crime, whose elements do not match an ACCA offense," and then being "treat[ed by a federal sentencing court] as though he had pleaded to" a more serious crime, which is "an ACCA predicate, based on

legally extraneous statements found in the old record." *Id.* The same unfairness can occur under the court of appeals' approach, even where factfinding about the means of commission is limited to statutes that explicitly list alternative means of commission.

For example, in Alabama, first-degree burglary prohibits "enter[ing] or remain[ing] unlawfully in a dwelling." Ala. Code § 13A-7-5(a). Third-degree burglary, however, requires only "enter[ing] or remain[ing] unlawfully in a building," which is defined by statute to include vehicles as well as dwellings. Ala. Code §§ 13A-7-1(2), 13A-7-7(a); *see Green* v. *State*, 424 So. 2d 704, 705 (Ala. Crim. App. 1982) (the elements of third-degree burglary are "(1) knowingly entering or remaining unlawfully in a building and (2) intent to commit a crime therein"). Thus, an Alabama conviction for first-degree burglary would necessarily fall within the scope of generic burglary, while a conviction for third-degree burglary would not (because it could involve burglary of a vehicle). Under the court of appeals' approach, however, a defendant who pleaded guilty to the lesser Alabama offense of third-degree burglary could nonetheless be sentenced under ACCA as if he had pleaded guilty to first-degree burglary if his charging document or plea agreement happened to mention (unnecessarily) that he had broken into a dwelling. *Cf. United States* v. *Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014) (finding Alabama's third-degree burglary statute overbroad and indivisible for ACCA purposes).

Using the modified categorical approach where a statute lists alternative means will also lead to unjustifiable disparities between States that define an offense in the exact same way. *See Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013) (under elements-based ap-

proach, "defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law. This was *Taylor*'s chief concern in adopting the categorical approach."). Consider two States that both create a single crime of burglary of a structure, which can be committed through unlawful entry of a building or a vehicle. State A has done so by codifying a statutory definition of "structure" that lists buildings and vehicles. State B reached the same result through judicial interpretation of the term "structure" in the burglary statute. Although burglary has the same scope in both States, the court of appeals' approach would produce different results, with the modified categorical approach being available in cases from State A but not in cases from State B. There is no doctrinal reason for such a disparity.[12]

Finally, the court of appeals' approach significantly complicates a defense attorney's strategic advice and decisionmaking regarding charging documents, jury instructions, and plea agreements. *See Padilla* v. *Kentucky*, 559 U.S. 356, 364-366 (2010) (before deciding to plead guilty, a defendant is entitled to "effective assistance of competent counsel," including advice about the consequences of a conviction). Counsel representing a

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[12] Relatedly, this Court's elements-based approach affords due respect to state decisions about how to define crimes. For example, this Court has already concluded that Massachusetts' burglary statute is "divisible" because it sets forth alternative elements. *Descamps*, 133 S. Ct. at 2284. Other States might choose to set forth alternative means and define the elements of their burglary statutes more broadly—as is the case in Iowa, *see infra* Part II—which will make burglary easier to prosecute in state court, but will also mean that convictions do not serve as ACCA predicates. The choice of how to define state crimes is one for States to make, and this Court's adoption of the elements-based approach ensures that state choices will be respected in federal court.

defendant in a state prosecution could not predict whether a future federal sentencing court might read ambiguous *Shepard* documents as demonstrating a means of commission that, though completely irrelevant in the state plea proceeding, could dramatically alter a federal sentence under ACCA. For the same reasons, the court of appeals' facts-based approach makes it difficult for an attorney to advise her client about the consequences of a felon-in-possession conviction under 18 U.S.C. § 922(g); three prior convictions for overbroad offenses may or may not qualify the defendant for the sentence enhancement of § 924(e), depending on what facts a state prosecutor happened to mention in a charging document or elsewhere during the proceedings decades earlier. By contrast, an elements-based inquiry is predictable: any given offense either will or will not qualify as an ACCA predicate in all circumstances—that is the advantage of a categorical approach. *Descamps*, 133 S. Ct. at 2287 ("Congress ... meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none."); *see also Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987 (2015) ("[T]he [categorical] approach enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." (internal quotation marks omitted; alterations in original)).

Accordingly, the court of appeals was wrong to disregard the difference between means and elements when considering whether the Iowa burglary statute was divisible. As the remainder of this brief shows, the correct elements-based analysis compels the conclusion that the statute is *indivisible* and the modified categorical approach inappropriate in this case.

II. IOWA'S OVERBROAD BURGLARY CRIME IS INDIVISIBLE, SO THE MODIFIED CATEGORICAL APPROACH DOES NOT APPLY

Iowa's burglary statute is indivisible because the statutory list of alternative places sets forth means of commission that merely illustrate the kinds of places that would satisfy the single "occupied structure" element; they are not separate elements denoting separate burglary offenses. This conclusion follows from the fact that the State need not prove, and the jury need not find, that any particular kind of place was burglarized.

A person commits burglary under Iowa law by, among other things, unlawfully "enter[ing] an occupied structure[.]" Iowa Code § 713.1. "Occupied structure" is not defined in Section 713.1; instead, that term is subject to a general statutory definition contained in Iowa Code § 702.12, which defines the term "occupied structure" to include land, water, and air vehicles. In determining whether the alternative places listed in Section 702.12 are elements or means, decisions of the Supreme Court of Iowa are binding. *See Johnson* v. *United States*, 559 U.S. 133, 138 (2010) ("We are ... bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the State's battery statute); *Schad*, 501 U.S. at 636 (plurality opinion) ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law."); *Mullaney* v. *Wilbur*, 421 U.S. 684, 689-691 (1975) (Maine Supreme Judicial Court's decision that murder and manslaughter are alternative means of committing

the single crime of felonious homicide is a binding construction of Maine law); *Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626 (1875) ("The State courts are the appropriate tribunals ... for the decision of questions arising under their local law, whether statutory or otherwise.").

The Supreme Court of Iowa has ruled that the "occupied structure" language of Iowa's burglary law requires the State to prove "two independent elements ..., one related to place and the second related to activity, purpose, or use." *State* v. *Rooney*, 862 N.W.2d 367, 376 (Iowa 2015). The court elaborated that the statutory phrase "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place" identifies alternative means of satisfying a single, "broadly phrased ... element of place." *Id.* at 372, 376; *see also State* v. *Pace*, 602 N.W.2d 764, 769 (Iowa 1999) ("[O]ur definition of an occupied structure has two prongs. The first describes the type of place that can be the subject of burglary, and the second considers its purpose or use."); *State* v. *Sanford*, 814 N.W.2d 611, 616 (Iowa 2012) ("'any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place' satisfies the first prong").[13] Consequently, the Supreme Court of Iowa has "found the element satisfied in a wide variety of contexts." *Rooney*, 862 N.W.2d at 376.

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[13] The "activity or purpose" element is defined by the balance of the statutory definition of "occupied structure," *i.e.*, "adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value." Iowa Code § 702.12.

Even more tellingly, the Supreme Court of Iowa has held that, under the Iowa burglary law, two different places "could be charged ... alternatively and could be correspondingly submitted to the jury," and that "[i]f substantial evidence is presented to support each alternative *method of committing a single crime*"—*i.e.*, the different places charged—"and the alternatives are not repugnant to each other, then unanimity of the jury as to the *mode of commission of the crime* is not required." *State* v. *Duncan*, 312 N.W.2d 519, 522-523 (Iowa 1981) (emphases added; internal quotation marks omitted); *see also State* v. *Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984) ("*Duncan* ... reject[ed] defendant's contention that the trial court erred in permitting the jury to convict the defendant of burglary based on alternative theories of burglary of a marina and burglary of a boat in the marina."). The Supreme Court of Iowa not only described the places with language equivalent to this Court's phrase "means of committing"—"method" and "mode of commission"—but it also approved of charging practices that, as explained above, are constitutionally permissible only if the different places are means rather than elements. *See supra* Part I.B.

Indeed, the text of the definitional provision would scarcely permit treating the listed places as elements of separate offenses. The final item listed in the series of places is a "similar place" (Iowa Code § 702.12)—not a distinct and definite category of place into which the location of the burglary could be fit, but rather a catchall, indicating that the list collects illustrative means, not a finite list of alternative elements. *See Howard*, 742 F.3d at 1348-1349 (finding statute indi-

visible because the word "includes" introduced a list of "non-exhaustive examples").[14]

Because the Iowa burglary statute sets forth a single offense, not multiple offenses defined by alternative elements, the court of appeals erred in finding the statute of Mr. Mathis's conviction divisible and in applying the modified categorical approach. And because Iowa's single burglary offense undisputedly permits conviction in more situations than generic burglary, it is categorically not a valid ACCA predicate offense. Mr. Mathis accordingly should not have been sentenced under ACCA.

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[14] The *Shepard* documents the government proffered from Mr. Mathis's prior burglary convictions are inconclusive on this issue. *See* JA60; JA62; JA65; JA68; JA71. This is unsurprising. *Shepard* documents will regularly fail to answer definitively whether statutory alternatives are elements or means. "[P]rosecutors' charging documents do not always charge a defendant properly." *Almanza-Arenas*, 809 F.3d at 524 n.13. Similarly, jury instructions or other *Shepard* documents may sometimes be erroneous. *See Musacchio* v. *United States*, 136 S. Ct. 709, 713-714 (2016) (jury instruction erroneously added an element not required by law). Thus, to the extent this Court allows sentencing courts to consult *Shepard* documents to determine whether statutory alternatives are elements or means, courts must do so cautiously, and certainly not accord them greater weight than other sources of authoritative state law.

CONCLUSION

The judgment of the court of appeals should be reversed, Mr. Mathis's sentence vacated, and the case remanded.

Respectfully submitted,

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APPENDIX

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924. Penalties

* * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or

carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that–

> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

Iowa Code § 702.12 (1989). Occupied structure.

An "*occupied structure*" is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure"

Iowa Code § 713.1 (1989). Burglary defined.

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public, or who remains therein after it is closed to the public or after

the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

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No. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court may employ the "modified categorical approach" under Taylor v. United States, 495 U.S. 575 (1990), and Descamps v. United States, 133 S. Ct. 227 (2013), to determine whether a defendant was convicted of a crime constituting a predicate offense under the Armed Career Criminal Act of 1984 (such as generic "burglary"), when a defendant has been convicted under a state statute that sets out, in the alternative, several forms of committing an offense, or whether instead the applicability of the modified categorical approach depends on a state-law inquiry into whether the alternative forms of the offense represent "means" or "elements."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 786 F.3d 1068.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2015. A petition for rehearing was denied on June 23, 2015 The petition for a writ of certiorari was filed on September 15, 2015. The jurisdiction of this Court is invoked under 28 U.S C. 1254(1)

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Iowa, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). Pet. App. 3. He was sentenced as an armed career criminal under 18 U.S.C. 924(e) to 180 months of imprisonment, to be followed by five years of supervised release. Pet. App. 3. The court of appeals affirmed. Id. at 1-13.

1. The Armed Career Criminal Act of 1984 (ACCA) increases the statutory maximum sentence, and requires a 15-year mandatory minimum sentence, if a defendant is convicted of being a felon in possession of a firearm following "three previous convictions * * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" as

> any crime punishable by imprisonment for a term exceeding one year * * * that --
>
> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

18 U.S.C. 924(e)(2)(B).[1] This Court, in turn, has construed "burglary" under the ACCA ("generic burglary") as a crime "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Taylor v. United States, 495 U.S. 575, 599 (1990). Conversely, "burglary" under the ACCA does not include unlawful entry into other places, "such as automobiles and vending machines." Ibid.

Courts typically use a "categorical" approach to determine whether a prior conviction is for a violent felony under the ACCA. See Taylor, 495 U.S. at 600. Under that approach, they examine "the statutory definition[]" of the crime of conviction, in order to determine whether a jury would have necessarily had to find conduct constituting an ACCA predicate offense in order to convict. Ibid. Accordingly, to determine whether a defendant was convicted of "burglary" as that term is used in the ACCA, a court would examine whether the statute of conviction reached only "unlawful or unprivileged entry into, or

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[1] In Johnson v. United States, 135 S. Ct. 2551 (2015), this Court held void for vagueness the portion of the ACCA that designates as violent felonies convictions for conduct that "otherwise involves conduct that presents a serious potential risk of physical injury to another," 18 U.S.C. 924(e)(2)(B). That decision did "not call into question application of the [ACCA] to the four enumerated offenses, or the remainder of the Act's definition of a violent felony." Johnson, 135 S Ct. at 2563

remaining in, a building or structure with intent to commit a crime." Id. at 599. The court would not, however, inquire into "the particular facts underlying" a defendant's convictions. Id. at 600.

In a variation on that approach that is often referred to as the "modified categorical approach," courts may also "go beyond the mere fact of conviction to the charging paper and jury instructions" in a "narrow range of cases where a jury was actually required to find all the elements of generic burglary" or of another ACCA predicate offense, in order to return a conviction. Taylor, 495 U.S. at 601; see Shepard v. United States, 544 U.S. 13, 17 (2005) (addressing documents that may be permissibly consulted in a guilty-plea case). This approach is permissible only when the statute of conviction is "divisible -- i.e., comprises multiple, alternative versions of the crime," and a court is able to use conviction documents "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." Descamps v. United States, 133 S. Ct. 2276, 2285 (2013).

2. After police investigating the disappearance of a 15-year-old boy tracked the missing child to petitioner's home and conducted a search pursuant to a warrant, petitioner was arrested for being a felon in possession of a firearm. The police investigation began when the 15-year-old boy, referred to

in court documents as "K.G.," went missing. Police tracked the boy's cellular phone to petitioner's house. Petitioner's girlfriend answered the door, falsely claimed that petitioner was not home, and asserted that she did not know K.G.'s whereabouts. In fact, as petitioner's girlfriend later admitted, petitioner was inside the home with K.G. and two other young males. Later that night, petitioner returned K.G. to the home of K.G.'s grandmother. K.G. subsequently disclosed to the police that petitioner had forcibly molested him. After K.G. reported the sexual abuse, police obtained and executed warrants to search petitioner's residence. There, they found a loaded rifle and ammunition, as well as electronic evidence indicating that petitioner was engaging in sexually explicit communications with underage males and arranging to bring underage males to his home. Pet. App. 2.

Based on the evidence recovered in the search of petitioner's residence, petitioner was charged with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He pleaded guilty. Pet App. 3.

The government argued that petitioner was subject to the ACCA because petitioner had six convictions that qualified as "violent felonies" under the ACCA. Gov't Sentencing Memorandum, D. Ct. Doc. 55 at 1 (Sent. Mem.) (May 6, 2014). The government argued that petitioner's felony conviction for interference with

official acts causing serious injury constituted a violent felony, because that crime has as an element the use of force against a person of another. Id. at 6-7 (citing United States v. Malloy, 614 F.3d 852, 859-860 (8th Cir. 2010), cert. denied, 131 S. Ct. 3023 (2011)).

In addition, the government argued that petitioner's five convictions for "burglary" in violation of Iowa law were violent felonies because they were convictions for "burglary" under the ACCA. Sent. Mem. 3. The government acknowledged that Iowa's burglary statute sweeps more broadly than "burglary" under the ACCA -- "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime" -- because Iowa's law applies to vehicles as well as buildings. Ibid. (quoting Taylor, 495 U.S. at 599); Iowa Code Ann. § 713.1 (1989) (explaining that burglary constitutes unlawful entry into any "occupied structure"); see Iowa Code Ann. § 702.12 (1989) (defining "occupied structure" to reach not only "any building [or] structure" but also any "appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value," excluding any "box, chest, safe, changer, or other object or device which is adapted or used for the deposit or

storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it").[2]

The government argued, however, that application of the modified categorical approach established that petitioner's convictions were for ACCA burglary. It explained that "[i]f an overbroad statute specifies alternative methods of committing the offense, some of which fit the generic definition of burglary and some of which do not, the statute is divisible." Sent. Mem. 3 (citing Descamps, 133 S. Ct. at 2282 (describing a "divisible statute[]" as one that "sets out one or more elements of the offense in the alternative -- for example, stating that burglary involves entry into a building or an automobile")). Here, the government argued, petitioner's five burglary convictions were for generic "burglary" under the ACCA, because he was convicted of burglarizing buildings and structures rather than vehicles or other places not covered by the generic offense. Id. at 4-5. In particular, the government noted,

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[2] The courts below conducted their analysis using the provisions of the Iowa Code in effect in 1989, because those provisions were in effect at the time of four of petitioner's five burglary convictions. Pet. App. 8 n.8. These convictions included two convictions that constituted generic federal burglary because they were convictions for burglary of buildings. See id. at 11-12 (concluding that petitioner's convictions for breaking and entering "garages" were convictions for burglary of buildings under Iowa law).

petitioner had been charged with, and convicted of, unlawfully entering (1) a "house and garage," (2) a "garage," (3) a "garage," (4) a "machine shed," and (5) a "storage shed." Ibid.; Gov't C.A. Br. Addendum 1-14.

The district court agreed. It concluded that Iowa's statute setting out various forms of burglary was divisible under Descamps, supra. 7/10/14 Sent. Tr. 15-16; see Pet. App. 3. And it agreed that the indictments resulting in petitioner's burglary convictions showed that, in each case, petitioner had been convicted of generic burglary -- unlawful entry into buildings or structures with the intent to commit a crime. Pet. App. 3; 7/10/14 Sent. Tr. 16.[3] The court also agreed that petitioner's conviction for interference with official acts inflicting serious injury qualified as a "violent felony" under the ACCA, relying on an Eighth Circuit decision concluding that offense "has as an element the use, attempted use, or threatened use of physical force against the person of another," Malloy, 614 F.3d at 860. See 7/10/14 Sent. Tr. 16. Because the court concluded that these six convictions were for "violent felonies," it found that petitioner was subject to the ACCA.

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[3] In the alternative, the district court concluded that petitioner's burglary convictions qualified as violent felonies under the ACCA's residual clause. 7/10/14 Sent. Tr. 16. This Court subsequently held the residual clause void for vagueness in Johnson. See 135 S. Ct. at 2563; note 1, supra.

Ibid. The court sentenced petitioner to 15 years of imprisonment. Pet. App. 3, 42-44.

3. The court of appeals affirmed. Pet. App. 1-13. As relevant here, the court agreed that petitioner was an armed career criminal under the ACCA, relying on petitioner's conviction for interference with official acts inflicting serious injury (which petitioner did not dispute was an ACCA predicate), id. at 4 n.2, and at least two of petitioner's Iowa burglary convictions, id. at 11-12.

In considering petitioner's Iowa burglary convictions, the court of appeals held that the Iowa burglary statute is divisible and, therefore, the modified categorical approach was available to determine whether petitioner was convicted for generic burglary within the meaning of the ACCA. The court explained that Iowa's burglary statute "exhibits the exact type of divisibility" discussed in Taylor and Shepard, because Iowa law sets out in the alternative "a set of elements that conforms with generic burglary" ("entry into a 'building' or 'structure'") and another set that does not ("entry into a 'land, water, or air vehicle.'"). Pet. App. 9 (quoting Iowa Code Ann § 702.12 (1989)).

Petitioner had asserted that burglary was not a divisible offense under Iowa law. In his view, jurors were not required to find unanimously which type of location was burglarized by a

particular defendant, and, therefore, the statute set out alternative "means" of committing burglary, rather than alternative elements. Pet. App. 10 (explaining that, in petitioner's view "'jurors need not all agree on whether' [a defendant] burgled a building, a boat, or a car.'") (citation omitted). The court of appeals acknowledged that the issue was "a matter that splits our sister circuits." Id. at 10 n.6 (citing cases).[4] The court then concluded that when a statute set out several alternative forms of an offense, and conviction documents established the alternative form that had been the basis for the charge and conviction, no further inquiry was required into whether, under state law, the alternative forms of the offense constituted "means" or "elements" in the sense described by petitioner. Id. at 10. The court explained that petitioner's proposed "means/elements distinction * * * was expressly rejected in Descamps," this Court's most recent case explicating the modified categorical approach. Ibid.; see ibid. (quoting Descamps's statement that "[w]hen a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to

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[4] The court of appeals compared, for example, Rendon v. Holder, 764 F.3d 1077, 1086 (9th Cir. 2014) (requiring alternative elements, rather than means), with United States v. Prater, 766 F.3d 501, 510 (6th Cir. 2014) (finding a state burglary law divisible when it listed alternative burglary locations with an "or").

those of the generic offense") (quoting 133 S. Ct. at 2285 n.2)).[5]

After concluding that the modified categorical approach was applicable, the court of appeals examined the charging documents that corresponded to petitioner's Iowa burglary convictions. Pet. App. 11. The court noted that petitioner "was charged with and convicted of entering garages in relation to two of his burglary convictions" and that "[b]ecause a garage is clearly a 'building,'" and burglary of a "building" constitutes burglary under the ACCA, petitioner was convicted under the portion of Iowa's burglary statute "that conforms with generic burglary." Id. at 11-12. The court concluded that these burglary

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[5] The court of appeals stated that petitioner's case also implicated "another split," concerning whether courts may apply the modified categorical approach when the alternative forms of an offense are specified in part through a definitional "statute or subsection, outside of the convicting statute." Pet. App. 11 n.7. The court stated that its cases, and those of a number of other circuits, permitted courts to consider "definitions of defined terms outside the convicting statute" in determining whether state law set out multiple offenses in the alternative for purposes of the modified categorical approach. Ibid. (citing United States v. Hockenberry, 730 F.3d 645, 669 (6th Cir. 2013), cert. denied, 134 S. Ct. 1044 (2014); United States v. Herrera-Alvarez, 753 F.3d 132, 139-140 (5th Cir. 2014); United States v. Martinez, 756 F.3d 1092, 1095-1096 (8th Cir. 2014); United States v. Bell, 445 F.3d 1086, 1090 (8th Cir. 2006); United States v. Trent, 767 F.3d 1046, 1056 (10th Cir. 2014), cert. denied, 135 S. Ct. 1447 (2015)). It noted that a Ninth Circuit decision had "declin[ed] to consult a separate statute that defined the term 'custody'" when determining whether an "escape" statute was divisible. Ibid. (discussing United States v. Simmons, 782 F.3d 510 (2015)).

convictions, together with petitioner's conviction for interference with official acts inflicting serious injury, established that petitioner was an armed career criminal under the ACCA. Id. at 12.

DISCUSSION

Petitioner contends (Pet. 5-10) that this Court should grant a writ of certiorari to resolve a conflict in the courts of appeals concerning when the modified categorical approach applies. The United States agrees that this Court's review is warranted. The court of appeals correctly held that when a defendant is convicted under a state statute that sets out several alternative forms of committing an offense, some of which are generic and some not, a court may examine the conviction records to determine whether the defendant was necessarily convicted of a form of the offense that qualifies as generic, without inquiring into whether the alternative constitutes a "means" or an "element" under state law. The courts of appeals, however, have reached conflicting conclusions on this precise issue. Because whether a statute is "divisible," such that the modified categorical approach may be applied, is a recurring question of substantial importance, and this case is an appropriate vehicle in which to address the question, the petition for a writ of certiorari should be granted.

1. The court of appeals correctly held that a state statute is divisible when it sets out alternative methods of committing an offense, some of which constitute the generic form of the offense and some do not. A court may then employ the modified categorical approach and examine the documents underlying the defendant's conviction to determine whether the defendant was convicted of a form of the offense that satisfies the generic federal definition. No further inquiry into the status of the alternatives under state law as "means" or "elements" is required.

That approach reflects this Court's consistent explanation of the modified categorical approach. In Taylor v. United States, 495 U.S. 575 (1990), this Court explained that whether a defendant had been convicted of a predicate offense for purposes of ACCA turns on "the statutory definition of the prior offenses" rather than "the facts underlying the prior convictions." Id. at 600. The Court noted, however, that some States "define burglary more broadly [than the generic definition relevant under the ACCA], e.g., by eliminating the requirement that the entry be unlawful, or by including places, such as automobiles and vending machines, other than buildings." Id. at 599, 602. With respect to convictions under such broader burglary statutes, the "categorical approach * * * may permit the sentencing court to go beyond the mere fact of conviction"

and examine whether, for example, "a jury was actually required to find all the elements of generic burglary." Id. at 602. If the conviction documents establish that a defendant was charged with, and pleaded guilty to, a form of burglary that qualifies as an ACCA predicate, "the Government should be allowed to use the conviction for enhancement." Ibid.

In Shepard v. United States, 544 U.S. 13 (2005), the Court reaffirmed Taylor's recognition that when a defendant has been convicted of violating a statute that sets out multiple crimes in the alternative, a court may review certain reliable conviction records to determine whether the conviction establishes that a jury necessarily found (or the defendant necessarily admitted) an ACCA predicate. Shepard addressed the application of the modified categorical approach to the Massachusetts burglary statute which, like Iowa's burglary statute, reaches beyond generic burglary's coverage of entries into buildings and structures, "by extending [burglary] to entries into boats and cars." Id. at 16. Shepard concluded that, in the context of a guilty plea under an overbroad statute of this type, a court could consider "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information," id. at 26, in

order to determine "whether the plea had 'necessarily' rested on the fact identifying the burglary as generic," id. at 21 (quoting Taylor, 495 U.S. at 602).

Most recently, in Descamps v. United States, 133 S. Ct. 2276 (2013), this Court expressly rejected the contention that the applicability of the modified categorical approach depends on a state-law inquiry into whether, in a case in which multiple forms of a single offense were charged, jurors would need to be unanimous about the form of the offense that the defendant had committed. To illustrate the circumstances in which the modified categorical approach could be applied, the Court in Descamps compared a hypothetical aggravated assault statute forbidding assault with any of eight specified weapons with an assault statute that requires an indeterminate weapon. The Court explained that the first statute would, by virtue of its structure, be a divisible statute to which the modified categorical approach applied, but the second statute would not be. Id. at 2289-2290. The Court also expressly rejected the dissent's contention that its approach to divisibility would require state-law inquiries, because the appropriate analysis proceeds from the Taylor- and Shepard-approved documents:

> Whatever a statute lists (whether elements or means), the documents we approved in Taylor and Shepard -- i.e., indictment, jury instructions, plea colloquy, and plea agreement -- would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted

> in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. at 2285 n.2.

Descamps made explicit what follows logically from Taylor and Shepard: a court need not "parse state law" to determine whether a statute that provides alternatives (some generic, some not) is divisible. Rather, the existence of statutory alternatives is sufficient. Applying this approach, the courts below correctly concluded that petitioner qualifies as an armed career criminal, relying on at least two of petitioner's Iowa burglary convictions and a further undisputed ACCA predicate. As the court of appeals explained, Iowa's burglary statute, Iowa Code Ann. § 713.1 (1989), sets out several forms of burglary through an enumerated list of alternative locations that can be burglarized, Iowa Code Ann. § 702.12 (1989). That list makes Iowa burglary broader than the generic offense, because it covers entry not only into a "building" or "structure," but also into "a land, water or air vehicle." Pet. App. 9. Conviction documents established that in at least two of his cases, petitioner had been convicted of forms of Iowa burglary that constituted federal generic burglary for ACCA purposes -- namely, the burglary of a building or structure. Id. at 11-12. Accordingly, the courts below correctly classified petitioner as an armed career criminal.

2. As the court below noted, in the wake of Descamps, a conflict has emerged in the courts of appeals concerning whether a state statute that sets out several alternative forms of an offense is divisible only if state law would require jurors to be unanimous on the form of the offense committed. Pet. App. 10 n.6 ("We recognize the means/elements distinction is a matter that splits our sister circuits."). This conflict is deep and widespread and extends to both criminal and immigration cases.

In addition to the Eighth Circuit in this case, the Sixth and Tenth Circuits have rejected state-law inquiries into whether juror unanimity is required on a statutory alternative to determine whether a statute providing alternatives is divisible. Pet. App. 1-13; United States v. Ozier, 796 F.3d 597, 601-602 (6th Cir. 2015); United States v. Trent, 767 F.3d 1046, 1057 (10th Cir. 2014), cert. denied, 135 S. Ct. 1447 (2015). In those circuits, when a defendant has been convicted under a state statute that sets out multiple versions of a crime in the alternative, a court may examine conviction records to ascertain whether the records conclusively establish that the defendant was convicted under a portion of the statute that satisfies a generic federal definition (such as burglary). No further inquiry is required into whether state law provides that in every case, jurors must be unanimous on which of the alternative forms of the offense was the basis of the

defendant's conviction. Pet. App. 10-12; United States v. Ozier, 796 F.3d at 601-602 ("Descamps expressly rejected defendant's finite parsing of state law as to the difference between 'means' and 'elements'"); United States v. Trent, 767 F.3d at 1061 ("[N]o Supreme Court opinion addressing the modified categorical approach has ever found it appropriate to examine whether an alternative statutory phrase is an 'element'" in the sense of requiring juror unanimity under state law).

The Fourth and Ninth Circuits, in contrast, require such an inquiry into state law. In Rendon v. Holder, 764 F.3d 1077 (2014), a panel of the Ninth Circuit concluded, based on its interpretation of Descamps, that statutes setting out alternative forms of an offense are divisible only if, under state law, jurors would be required to be unanimous as to the form of the offense the defendant committed. Id. at 1086 ("[I]t is black letter law that a statute is divisible only if it contains multiple alternative elements, as opposed to multiple alternative means"; therefore, disjunctive statutes are divisible "[o]nly when state law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute"). The Ninth Circuit denied en banc review, over the dissents of nine judges in two published opinions. See Rendon v. Holder, 782 F.3d 466, 467-473 (2015)

(Graber, J., dissenting from the denial of rehearing en banc); id. at 473-474 (Kozinski, J., dissenting from denial of rehearing en banc). Judge Graber explained that the panel had "ignored, without explanation," this Court's "clear command" and "holds that we must do precisely what the Court instructed us not to do: parse state law to determine whether the statutory alternatives are elements or means." Id. at 467. Noting that the issue is "exceptionally important" because of the widespread use of "[t]he modified categorical approach" in "both immigration and criminal cases," she criticized an approach that will require courts "to delve into the nuances of a seemingly endless variety of state laws in order to determine whether, in the abstract, a jury must unanimously agree as to which statutory alternative the defendant committed -- a notoriously uncertain inquiry." Id. at 471 (capitalization altered). Judge Kozinski added that "[g]iven the degree of conflict and confusion amongst the circuits, the Supreme Court will surely revisit this issue sooner rather than later." Id. at 474.[6]

The Fourth Circuit has also interpreted Descamps to require an inquiry into the state-law elements that a jury must find unanimously, in order to determine whether a statute is

---

[6] Rendon was an immigration case, but the categorical and modified categorical approaches are also applied in immigration cases. See Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 186-187 (1990); Rendon, 764 F.3d at 1082.

divisible. Omargharib v. Holder, 775 F.3d 192, 198-199 (2014) (following Rendon in holding that "a crime is divisible under Descamps only if it is defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime)," noting that "[e]lements, as distinguished from means, are factual circumstances of the offense the jury must find unanimously and beyond a reasonable doubt") (internal quotation marks omitted); United States v. Fuertes, 805 F.3d 485, 498 (2015). Judge Niemeyer concurred in Omargharib to note his view that Descamps was "the source of * * * confusion" concerning the scope of the modified categorical approach. 775 F.3d at 201. He wrote that "[w]ere the Supreme Court willing to take another look at this area of law, it might well be persuaded" to revisit the approach he understood Descamps to reflect. Id. at 202.[7]

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[7] The Board of Immigration Appeals also concluded in a published decision arising from an immigration proceeding that if a statute sets out alternative offenses, the modified categorical approach may be used only if, under state law, jurors would be required to agree as to which alternative form of the offense had been committed. In re Chairez-Castrejon, 26 I. & N. Dec. 349 (2014), reconsideration granted in part and denied in part, 26 I. & N. Dec. 478 (2015). Subsequently, however, the Attorney General directed that the Board refer its decision in Chairez-Castrejon and in another case to her for review, in order to address the "proper approach for determining 'divisibility' within the meaning of" Descamps. In re Chairez-Castrejon and Sama, 26 I. & N. Dec. 686 (B.I.A. 2015). The

Absent this Court's intervention, the conflict over how to apply the modified categorical approach will persist. The Ninth Circuit denied rehearing en banc over nine dissenting votes in Rendon, and the circuits that have rejected its approach show no sign of moving to the other side of the split. Geographic disparity on such a basic question in implementing the modified categorical approach leads to disparate treatment of similar cases and hinders uniform national administration of important federal laws.[8]

Attorney General set a schedule for briefing that extends through January 2016. Ibid.

[8] Petitioner suggests that "[t]here is a circuit split on whether the modified categorical approach should extend to statutory definitional provisions that are separate from, but serve to explain, terms used in a statute of conviction." Pet. 5 (citing Pet. App. 11 n.7). But the decision that petitioner and the court of appeals perceived to generate a conflict on this subject did not in fact adopt a rule that definitional provisions always set out means on which jurors need not agree. See United States v. Simmons, 782 F.3d 510, 516-517 (9th Cir. 2015). Instead, that decision simply applied Rendon in holding that the particular definitional provision before it set out alternative means under state law. Id. at 517 ("Hawaii law makes clear that none of the three 'modes' of custody set forth in" the definitional provision "needs to be proven in order to convict a defendant"). And contrary to petitioner's contention, no reason exists to ignore definitional provisions in determining divisibility. Petitioner contends that definitional provisions are "by their nature explanatory and descriptive of * * * means," rather than "elements," Pet. 7. But as discussed above, the "means" versus "elements" distinction is not controlling. And, in any event, no reason exists why definitional provisions cannot provide alternative discrete elements of criminal liability, depending on state law

3. The question presented implicates a recurring issue of substantial importance, and this case presents an appropriate vehicle for resolving it.

a. The modified categorical approach "arises frequently in both immigration and criminal cases." Rendon, 782 F.3d at 471 (Graber, J., dissenting from denial of rehearing en banc). In the criminal context, the categorical and modified categorical approaches are used not only under the ACCA, but also under the Sentencing Guidelines, which increase the recommended sentences for certain defendants who have prior felony convictions for crimes of violence or controlled substance offenses. See, e.g., Sentencing Guidelines §§ 4B1.1, 4B1.2.

The categorical and modified categorical approaches are also used in the immigration context, to determine whether an alien has been convicted of an offense that triggers civil or criminal immigration-related consequences. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 et seq., provides for the removal from the United States of aliens convicted of specified types of crimes, whether committed in violation of state or federal law or the law of another country. See 8 U.S.C. 1182(a)(2); 1227(a)(2); 1227(a)(2)(A)(iii). In addition, an alien convicted of a crime within the most serious of these INA categories -- the "aggravated felony" category -- also faces a higher statutory maximum and a higher Sentencing Guidelines

range if the alien illegally reenters the country after being removed and is prosecuted for that crime, see 8 U.S.C. 1326(b)(2); Sentencing Guidelines § 2L1.2(b)(1)(C). And where the modified categorical approach is potentially applicable, the approach to divisibility will often determine whether an alien who has committed a serious crime may remain in the country.

b. Petitioner's case is a suitable vehicle in which to address the divisibility question on which the courts of appeals are divided. The question was squarely decided in a published opinion by the court below. And because petitioner has only one ACCA predicate that is not a burglary conviction under Iowa law, petitioner's status as an armed career criminal depends on whether his Iowa burglary offenses may constitute ACCA predicates.

Several later-filed petitions decisions present the same or similar questions for review, but none is a superior vehicle. See Patrie v. United States, petition for cert. pending, No. 15-6468 (filed Oct. 8, 2015); Evenson v. United States, petition for cert. pending, No. 15-6561 (filed Oct. 14, 2015); Goodwin v. United States, petition for cert. pending No. 15-6603 (filed Oct. 16, 2015); Boaz v. United States, petition for cert. pending, No. 15-6645 (filed Oct. 20, 2015); Castro-Martinez v. United States, No. 15-7106 (filed Nov. 17, 2015). The petitions in Evenson and Castro-Martinez are less suitable vehicles

because the petitioners seek to challenge the application of the advisory Sentencing Guidelines. The petition in Boaz is a less suitable vehicle because the petitioner is challenging the denial of his late-filed motion for post-conviction relief under 28 U.S.C. 2255. And the petitions in Patrie and Goodwin seek review from Eighth Circuit decisions that principally relied on the decision below, and therefore do not contain as detailed an analysis of the issue that has divided the courts of appeals. Accordingly, this case presents a superior vehicle.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2015

No. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **BRIEF FOR THE UNITED STATES**, via email and by first-class mail, postage prepaid, this 17th day of December, 2015.

[See Attached Service List]

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December 17, 2015

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ON WRIT OF CERTIORARI
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QUESTION PRESENTED

Whether a court may employ the "modified categorical approach" under *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), to determine whether a defendant was convicted of a crime constituting a predicate offense under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e), such as generic "burglary," when a defendant has been convicted under a state statute that sets out, in the alternative, several forms of committing an offense, or whether instead the applicability of the modified categorical approach depends on a state-law inquiry into whether the alternative forms of the offense represent "means" or "elements."

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OPINION BELOW

The opinion of the court of appeals (J.A. 7-21) is reported at 786 F.3d 1068.

JURISDICTION

The judgment of the court of appeals was entered on May 12, 2015. A petition for rehearing was denied on June 23, 2015 (J.A. 22). The petition for a writ of certiorari was filed on September 15, 2015, and was granted on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-4a.

STATEMENT

1. Congress enacted the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to incapacitate repeat offenders who have been convicted of serious

crimes. See *Taylor* v. *United States*, 495 U.S. 575, 581 (1990). The statute increases the statutory maximum sentence, and requires a 15-year mandatory minimum sentence, if a defendant is convicted of being a felon in possession of a firearm following three previous convictions for a "violent felony" or "serious drug offense." 18 U.S.C. 924(e)(1). The ACCA defines a "violent felony" to include, *inter alia*, any crime punishable by more than one year that "is burglary, arson, or extortion." 18 U.S.C. 924(e)(2)(B)(ii).

The question in this case is whether an Iowa burglary conviction qualifies as a conviction for "burglary" under the ACCA. In a series of decisions, this Court set out a framework for answering that question. See *Descamps* v. *United States*, 133 S. Ct. 2276, 2281-2282 (2013); *Shepard* v. *United States*, 544 U.S. 13, 19-20, 26 (2005); *Taylor*, 495 U.S. at 598-600. The federal sentencing court first compares the definition of the prior offense in the state statute of conviction to the definition of "generic" burglary under the ACCA. *Taylor*, 495 U.S. at 599. If the state-law definition is the same as, or narrower than, the definition of the generic offense, the state conviction qualifies as one for ACCA "burglary" on a categorical basis. *Ibid.*

If the state-law definition is broader than the generic offense, then the court asks whether the state statute is divisible, *i.e.*, whether it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct at 2284. If the text of the statute sets out alternative versions of the offense, one of which is the generic offense, the statute is textually divisible and a court may use the modified categorical approach to determine whether the defendant was convicted of the generic form of the offense. *Shepard*, 544 U.S. at 17;

Taylor, 495 U.S. at 599, 602. Under that approach, the court looks to a limited class of conviction documents (such as the charging document and jury verdict or guilty plea) to determine whether the jury necessarily found or the defendant necessarily admitted elements of the generic offense in the prior proceeding. *Shepard*, 544 U.S. at 26. If the state statute is broader than the generic offense and does not list an alternative version of the offense that corresponds to generic burglary, the sentencing court may not use the modified categorical approach, because the conviction documents cannot establish that the defendant necessarily was convicted of the generic offense. *Descamps*, 133 S. Ct. at 2285-2286.

Petitioner contends that a sentencing court must add another step before it can conclude that a state statute is divisible and therefore can be analyzed using the modified categorical approach. In his view, it is not enough for the court to conclude that an alternative phrasing of the offense matches the definition of generic burglary. In addition, he says, the federal sentencing court must decide whether, as a matter of state law, the alternative phrasing is an "element" of the offense or a "means" of committing the offense. (A statutory alternative is a means, rather than an element, if a defendant charged with two alternatives could be convicted based on a finding that he satisfied either one of the alternatives, without the factfinder deciding which one. See *Schad* v. *Arizona*, 501 U.S. 624, 631 (1991) (plurality opinion).) In petitioner's view, if the alternative phrasing is a "means," the state statute is not divisible and the offense is never an ACCA predicate—even if the defendant was

charged with and convicted of the alternative corresponding to generic burglary.

2. In February 2013, police in Marion, Iowa, were investigating the disappearance of K.G., a 15-year-old boy. J.A. 8; Presentence Investigation Report (PSR) ¶ 8. Police tracked the missing child to petitioner's house. J.A. 8. Petitioner's girlfriend answered the door and said petitioner was not home and she did not know K.G.'s whereabouts. *Ibid.* That was a lie: petitioner was inside the house with K.G. and two other young boys. *Ibid.* Petitioner had sexually molested K.G. and he threatened to hurt K.G. if K.G. said anything to the police. *Ibid.*; PSR ¶¶ 12, 17.

K.G. returned home and reported the sexual abuse to the police. J.A. 8. The police obtained a warrant to search petitioner's house. *Ibid.* During the search, they found a loaded gun and ammunition, as well as evidence establishing that petitioner made contact with underage boys through a social networking site, sent them sexually explicit messages, and lured them to his house. *Ibid.* The police arrested petitioner, and he admitted that he owned the gun and ammunition. J.A. 9.

3. A grand jury returned an indictment charging petitioner with possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. 922(g)(1). J.A. 42-43. Petitioner pleaded guilty. J.A. 9, 44-59.

At sentencing, the government argued that petitioner was subject to the ACCA because he has six prior convictions for violent felonies—five Iowa burglary convictions and one Iowa conviction for interference with official acts causing serious injury. Gov't Sent. Mem. 1 (May 6, 2014) (D. Ct. Doc. 55); see PSR

¶ 31.[1] The parties agreed that the Iowa burglary statute is broader than generic burglary, because generic burglary involves unlawful entry into a "building" or "structure," *Taylor*, 495 U.S. at 599, and the Iowa statute prohibits unlawfully entering additional places, such as "vehicle[s]." Gov't Sent. Mem. 3-4 (citing Iowa Code § 713.1 (1989) (defining burglary as unlawful entry into an "occupied structure"), and Iowa Code § 702.12 (1989) (defining "occupied structure" through an enumerated list of places that includes buildings, structures, and vehicles)); see Def.'s Sent. Mem. 4 (May 29, 2014) (D. Ct. Doc. 58).[2]

The government explained that because the Iowa statute sets out alternative versions of the offense

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[1] Petitioner disputed the characterization of his interference-with-official-acts offense as an ACCA predicate in the district court but abandoned that argument in the court of appeals. J.A. 11 n.2. Petitioner now seeks to revive the issue (Br. 7 n.2), but his arguments lack merit. Contrary to petitioner's contentions, the district court found that the interference-with-official-acts offense was an ACCA predicate, see J.A. 35, and that finding was based on the first part of the ACCA's definition of "violent felony," 18 U.S.C. 924(e)(2)(B)(i), not the residual clause (which recently was invalidated in *Johnson* v. *United States*, 135 S. Ct. 2251 (2015)), see Gov't Sent. Mem. 6-7 (citing *United States* v. *Malloy*, 614 F.3d 852, 859-860 (8th Cir. 2010), cert. denied, 131 S. Ct. 3023 (2011)); J.A. 35 (relying on *Malloy*). Even if this offense did not qualify as an ACCA predicate, it would not matter; petitioner's five burglary convictions are ACCA predicates for the reasons stated in this brief.

[2] The courts below conducted their analyses using the 1989 version of the Iowa Code, which applied to four of petitioner's five burglary convictions. J.A. 15 n.4. The 1979 version of the Code, which applied to the fifth conviction, is not materially different. See Iowa Code §§ 702.12, 713.1 (1979). (Nor is the current version of the Code. See *id.* §§ 702.12, 713.1 (2015)).

through a list of alternative places that can be burgled, the statute is textually divisible and the modified categorical approach applies. Gov't Sent. Mem. 3-4. Under that approach, petitioner's convictions qualify as ACCA predicates because the conviction documents establish that petitioner burgled buildings or structures (specifically, a "house and garage," a "garage," a "garage," a "machine shed," and a "storage shed"). *Id.* at 4-6; J.A. 60-73. Petitioner contended that his convictions cannot qualify as ACCA predicates because under Iowa law, the list of places unlawfully entered sets out "illustrative examples" and not "alternative elements" of the burglary offense. Def.'s Sent. Mem. 5. (Petitioner did not cite any Iowa law for that proposition. See *ibid.*) Petitioner did not dispute that the conviction documents established that his prior convictions were for burgling buildings or structures. *Id.* at 5-6.

The district court applied the ACCA enhancement. J.A. 34-35. The court determined that the Iowa statute is divisible because its text sets out alternatives and concluded that the documents from petitioner's prior convictions establish that his burglary offenses all involved buildings or structures. *Id.* at 29, 34-35.

4. The court of appeals affirmed. J.A. 7-21. The court determined that, although the Iowa burglary statute "sweeps more broadly than generic burglary" because the term "occupied structure" includes vehicles, the statute is textually divisible based on its list of places. J.A. 16-17. The court explained that the Iowa statute "exhibits the exact type of divisibility" contemplated by this Court in *Taylor* and *Shepard*, because it sets out an alternative that "conforms with generic burglary" ("entry into a 'building' or 'struc-

ture'") and one that does not ("entry into [a] 'land, water or air vehicle.'"). J.A. 17 (quoting Iowa Code § 702.12 (1989)). The court therefore applied the modified categorical approach and concluded that petitioner's conviction documents establish that he had been convicted of generic burglary. J.A. 16-19.

Petitioner had argued that the modified categorical approach is inapplicable because the definition of "occupied structure" in the Iowa statute "do[es] not present alternative elements, but instead simply present[s] different types of occupied structures." J.A. 17. The court of appeals rejected that view, explaining that whether the places listed in the statute "amount to alternative elements or merely alternative means to fulfilling an element" does not matter to whether the statute is divisible. J.A. 17-19 (relying on *Descamps*, 133 S. Ct. at 2285 n.2).

SUMMARY OF ARGUMENT

A federal sentencing court may use the modified categorical approach to determine whether a prior state or federal offense qualifies as "burglary" under the ACCA when the statute is textually divisible, meaning that it sets out alternative ways of committing the offense. The court need not conduct a separate inquiry into whether those alternatives are "means" or "elements" under state law.

A. Under *Taylor* v. *United States*, 495 U.S. 575 (1990), whether a prior state or federal conviction is one for ACCA "burglary" depends on whether "the statutory definition" of the prior crime categorically matches the "generic" definition of burglary. *Id.* at 599-600. If the statutory definition of the prior offense is broader than generic burglary, the modified categorical approach may be applied if the statute is

divisible. *Descamps* v. *United States*, 133 S. Ct. 2276, 2284 (2013). As the government interprets *Descamps*, a statute is divisible when the statutory text sets out alternatives in the disjunctive and at least one alternative is a categorical match for the generic offense. In such a case, the sentencing court may look to a limited class of conviction documents to determine whether the defendant's prior conviction was for the generic offense.

B. Petitioner contends that a statute is not divisible (and the modified categorical approach may not be used) when the statutory alternatives are "means," rather than "elements," under state law. To answer that means-versus-elements question, the federal court must determine whether, in a state case where multiple alternatives were charged and submitted to the jury, the jury would have to agree on one particular alternative in order to convict.

This Court has never adopted petitioner's approach. In none of its modified categorical approach decisions did the Court conduct a state-law inquiry into "means" or state that such an analysis is required before a statute is divisible. Instead, the Court has based divisibility on the text of the statute: if the text lists alternatives in the disjunctive, it is divisible. If petitioner were correct, it would mean that this Court's decisions in *Taylor*, *Shepard*, *Descamps*, and several other modified categorical approach cases were either materially incomplete or wrongly decided.

Petitioner relies on this Court's use of the word "elements" in its decisions, particularly in *Descamps*. But the Court used "elements" to refer to the statutory definition of the offense, not to distinguish between "means" and "elements." Indeed, in *Descamps* the

Court expressly equated "statutory definitions" and "elements": "Sentencing courts may 'look only to the *statutory definitions*'—*i.e.*, *the elements*—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" 133 S. Ct. at 2283 (quoting *Taylor*, 495 U.S. at 600 (emphasis added)).

C. Petitioner contends that his approach is required to ensure that a defendant had been convicted of all elements of generic burglary in his prior proceeding. But the modified categorical approach itself provides that assurance. If a defendant was charged with burgling a building (and no other place), and the jury convicted him, the "jury necessarily had to find" (*Taylor*, 495 U.S. at 602) that the defendant committed generic burglary. It does not matter whether the type of place is a "means" under state law; when only one means is charged, the government necessarily proves the element by proving the means.

Petitioner is likewise mistaken in contending that his approach is required to avoid constitutional concerns. Under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), any fact, other than the fact of a prior conviction, that increases the defendant's sentence beyond the otherwise-applicable statutory maximum must be proven beyond a reasonable doubt. *Id.* at 490. As a result, a sentencing court characterizing a prior offense may use only the approved conviction documents, not its own factfinding. But the modified categorical approach already includes that limitation, and it does not depend on whether a statutory alternative is a "means" or an "element" under state law.

D. Federal district courts and immigration judges routinely apply the modified categorical approach.

They "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not." *Almanza-Arenas* v. *Lynch*, No. 09-71415, 2016 WL 766753, at *9 (9th Cir. Feb. 29, 2016) (en banc) (Watford, J., concurring). Petitioner's approach is just the opposite. The state-law question whether a certain phrase in a statute represents a "means" or an "element" is often a complex and difficult question of statutory interpretation. Frequently there is no authoritative state decision answering that question. *Descamps* therefore appropriately directed federal courts not to "parse state law" to determine whether a statutory alternative is divisible. 133 S. Ct. at 2285 n.2.

Adopting petitioner's approach would seriously undermine the ACCA's purposes. Congress enacted the ACCA to incapacitate repeat offenders who commit serious crimes, and it was particularly concerned about burglary. This Court adopted a categorical approach in *Taylor* so that it could ensure that burglary convictions from "most States" (495 U.S. at 598) would qualify as ACCA burglary. But under petitioner's approach, few state convictions may qualify at all. Petitioner's approach therefore would substantially increase the workload of federal district courts and immigration judges, only to exempt the very defendants Congress wanted to reach. And these problems would be multiplied across the numerous other applications of the modified categorical approach.

E. Under the correct approach, the Iowa burglary statute is divisible. This Court therefore should affirm the judgment of the court of appeals.

ARGUMENT

A COURT MAY USE THE MODIFIED CATEGORICAL APPROACH TO DETERMINE WHETHER A PRIOR OFFENSE QUALIFIES AS "BURGLARY" UNDER THE ACCA WHEN THE STATUTE OF CONVICTION SETS OUT ALTERNATIVE WAYS OF COMMITTING THE OFFENSE, WITHOUT REGARD TO WHETHER THOSE ALTERNATIVES ARE MEANS OR ELEMENTS

Petitioner has five burglary convictions in Iowa. He contends that none of those convictions qualifies as a conviction for "burglary" under the ACCA—even though the Iowa burglary statute is textually divisible (because it identifies several alternative ways of committing the offense) and his conviction documents establish that his offenses involved buildings or structures (and therefore qualify as generic burglary). This Court has never required the state-law inquiry that petitioner advocates, and it disclaimed such an inquiry in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). Petitioner's approach is inconsistent with this Court's decisions, and it would create significant practical difficulties and disserve the statute's purposes. This Court should reject it.

A. Whether A State Offense Qualifies As An ACCA Predicate Depends On The Text Of The State Statute And The Prior Conviction Documents

1. The ACCA enhances the sentence of a defendant who is convicted of unlawful firearm possession when the defendant has three prior convictions for "violent felon[ies]." 18 U.S.C. 924(e)(1). The statute defines a "violent felony" to include any crime punishable by more than one year that "is burglary." 18 U.S.C. 924(e)(2)(B)(ii).

In *Taylor* v. *United States*, 495 U.S. 575 (1990), this Court set out an approach for determining whether a prior state or federal conviction qualifies as "burglary" under the ACCA. The Court first concluded that Congress intended the term "burglary" to have its "generic, contemporary meaning," used in most States, which is the "unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

The Court then addressed how to determine whether a prior offense corresponds to "generic" burglary. The Court set out a "categorical approach" for answering that question, under which a state offense that "ha[s] certain common characteristics" with generic burglary qualifies as ACCA "burglary," regardless of how the State labels the offense. *Taylor*, 495 U.S. at 588-589. The sentencing court compares "the statutory definition" of the state crime to the definition of generic burglary, and if the state definition matches generic burglary, the state conviction qualifies as "burglary" under the ACCA. *Id.* at 599, 600. If the state statute is narrower than the generic definition of burglary (because, for example, it includes an aggravating factor not present in generic burglary), the state conviction also qualifies, because a conviction under that statute "necessarily implies that the defendant has been found guilty of all the elements of generic burglary." *Id.* at 599.

The Court recognized, however, that some States "define burglary more broadly" than generic burglary. *Taylor*, 495 U.S. at 580, 599. For example, some States "includ[e] places, such as automobiles and vending machines, other than buildings." *Id.* at 599; see *id.* at 591, 599 (citing statutes in California, Mis-

souri, and Texas). When state law includes such a list, the sentencing court may "go beyond the mere fact of conviction" and look to state conviction documents to determine whether the defendant was convicted of the generic version of the offense. *Id.* at 602. The Court explained:

> [I]n a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

Ibid. The Court later described this use of court documents to determine the basis for a conviction under a divisible statute as the "modified categorical approach." *Descamps*, 133 S. Ct. at 2281, 2283-2284.

The Court made clear that a sentencing court is not to "engage in an elaborate factfinding process" to review the details of each defendant's prior conduct. *Taylor*, 495 U.S. at 601. Such judicial factfinding would create "practical difficulties" by requiring the sentencing court to undertake a difficult and time-consuming inquiry even in routine cases. *Id.* at 601-602. The virtue of a categorical approach, the Court explained, is that the sentencing court reviews only a limited class of information to decide whether a state offense corresponds to ACCA burglary. *Id.* at 600-602.

2. The fundamentals of the categorical approach have not changed in the 25 years since *Taylor*. But the Court has elaborated on that approach in two decisions, both of which (like *Taylor* itself) addressed

whether a prior state conviction qualified as "burglary" under the ACCA.

a. In *Shepard* v. *United States*, 544 U.S. 13 (2005), the Court addressed which conviction documents a sentencing court may use under the modified categorical approach to decide whether a defendant's prior conviction was for the generic form of burglary. The defendant's convictions were for burglary under Massachusetts law, and Massachusetts law was broader than generic burglary because it prohibited unlawful entry into boats and automobiles as well as buildings and structures. *Id.* at 16-17. Because the statute specified these places in the alternative, the Court explained, the sentencing court could review conviction documents to determine whether a defendant who pleaded guilty "necessarily admitted elements of the generic offense." *Id.* at 16-17, 26; see 18 U.S.C. 924(e)(1) (requiring that the defendant be "convict[ed]" of three qualifying offenses).

The Court then addressed which conviction documents a sentencing court may review. To "avoid[] * * * evidentiary enquiries into the factual basis for the earlier conviction," the Court explained, the sentencing court should look only to "charging documents filed in the court of conviction" and "recorded judicial acts of that court limiting convictions to the generic category." *Shepard*, 544 U.S. at 20. As examples of appropriate "judicial record evidence," the Court cited jury instructions and the verdict (for a case that went to trial) or the plea agreement, transcript of plea colloquy, and factual findings assented to by the defendant (for a case resolved by guilty plea). *Id.* at 16-17, 20. Limiting the inquiry to those judicial records with "conclusive significance" avoids

the constitutional concerns that "would follow from allowing a broader evidentiary enquiry" by the sentencing court. *Id.* at 24-25 (plurality opinion).

b. In *Descamps*, the Court considered a state statute that was broader than generic burglary but not textually divisible into alternatives. The California burglary statute prohibited "enter[ing]" certain locations without specifying that the entry must be unlawful (as is required for generic burglary). 133 S. Ct. at 2282. Because the text of the state statute could not be divided into alternative forms of the offense, the Court found the modified categorical approach inapplicable; the sentencing court could not use conviction documents to "identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." *Id.* at 2285.

Descamps explained that the modified categorical approach may be used for a burglary offense only when a statute is divisible, meaning that it "defines burglary * * * alternatively, with one statutory phrase corresponding to the generic crime and another not." 133 S. Ct. at 2286.[3] As an example of a divisible statute, the Court cited a "burglary statute (otherwise conforming to the generic crime) that prohibits entry of an automobile as well as a building"—the same example used in *Taylor*. *Id.* at 2284 (internal quotation marks omitted). The Court confirmed that a sentencing court faced with such a statute may "examine a limited class of documents" (identified in *Shep-*

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[3] The Court reserved whether the sentencing court can "take account not only of the relevant statute's text, but of judicial rulings interpreting it," *Descamps*, 133 S. Ct. at 2291, and it did not address common-law crimes.

ard) to determine which alternative was the basis for the defendant's conviction. *Ibid.*

3. These decisions establish a straightforward approach for determining whether a prior conviction is one for generic "burglary" under the ACCA: The sentencing court compares the statutory definition of the prior offense to the definition of generic burglary set out in *Taylor*. If the state offense uses the same definition as generic burglary (or a narrower one), the prior conviction qualifies as ACCA "burglary," with no further inquiry. If the statutory definition of the prior offense is broader than generic burglary and is textually divisible, the sentencing court may review the conviction documents approved in *Shepard* to determine whether the defendant was convicted of generic burglary. If the prior offense definition is broader than generic burglary and is not textually divisible (as in *Descamps*), the modified categorical approach may not be used because the sentencing court cannot determine from the conviction documents whether the prior conviction was for generic burglary.

The Court has used this approach in a variety of other contexts, including determining whether a prior conviction is for an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another," 18 U.S.C. 924(e)(2)(B)(i), see *Johnson* v. *United States*, 559 U.S. 133, 136-137, 144 (2010); whether a prior conviction qualifies under the ACCA's (now-invalid) residual clause, see, *e.g.*, *Chambers* v. *United States*, 555 U.S. 122, 125-126 (2009); and whether a prior conviction is one for a specified aggravated felony under the immigration laws, see, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185-190 (2007) (discussing 8 U.S.C.

1101(a)(43)(G)).[4] And the Court has confirmed that although its decisions about the enumerated-crimes provision of the ACCA all involved burglary, the same analysis applies to the other enumerated crimes (arson, extortion, and crimes involving use of explosives). *Shepard*, 544 U.S. at 17 n.2.

B. The Modified Categorical Approach Does Not Depend On Whether A Statutory Alternative Is A "Means" Or An "Element" Under State Law

1. Petitioner contends (Br. 15-25) that the foregoing discussion of the modified categorical approach is incomplete. In his view, a state statute is not "divisible" simply because it includes alternative phrases that identify different ways of committing the offense. In addition, he claims, the federal sentencing court must determine, as a matter of state law, whether any alternative phrase represents a "means" of committing the offense rather than an "element." If the alternative phrase is a "means," he concludes, the modified categorical approach is inapplicable.

Petitioner uses the term "element" to refer to a component of a criminal offense that the jury must find beyond a reasonable doubt to convict, and the term "means" to refer to alternative ways of committing an offense that need not be specifically found by the jury. Pet. Br. 18-19; see, *e.g.*, *Schad* v. *Arizona*,

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[4] In *In re Chairez-Castrejon*, 26 I. & N. Dec. 478, 481-482 (B.I.A. 2014), the Board of Immigration Appeals determined that it would follow circuit law on when a statute is divisible or, if there is no such law, would base divisibility on whether a statutory alternative is a means or an element. The Attorney General is reviewing that holding; in the meantime, the Board's holding is not precedential or binding. *In re Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (A.G. 2015).

501 U.S. 624, 636 (1991) (plurality opinion) (distinguishing between "elements" and "alternative means of committing a crime"). For example, if a defendant is charged in one count with burgling both a building and an automobile, and the facts presented at trial support both theories, the place being burgled is a "means" if the jury can return a guilty verdict by finding that the defendant burgled a house *or* an automobile (without unanimously deciding which one). See *Richardson* v. *United States*, 526 U.S. 813, 817 (1999). But if the jury must agree upon whether that defendant burgled a house or an automobile to convict him, the place is an "element." *Ibid.*

As the example demonstrates, the distinction between an "element" and a "means" matters only in a case where the prosecution argues that the defendant committed the offense in multiple ways. See *Richardson*, 526 U.S. at 818. If a defendant is charged only with burgling a building, and the jury convicts him, the question whether the place is a "means" or an "element" never arises, because the answer does not matter—even if the type of place would be a "means" in a different case, it is an "element" in this case because it is the only place alleged, and so the jury must find that the defendant burgled that place to convict him. Accordingly, in many cases (where the defendant is charged on only one theory), the distinction between means and elements does not make a difference. Yet in petitioner's view, the possibility that a jury could convict a hypothetical defendant charged with alternative means without choosing between those means would defeat the use of the modified categorical approach in every case, even where only a single means is alleged.

2. Petitioner's primary contention (Br. 16-17, 21-25) is that this Court's cases already require his approach. In his view, the Court's references to the "elements" of state offenses in its modified categorical approach decisions were signals to federal sentencing courts that they should delve into state decisional law to determine whether a statutory alternative is a "means" or an "element" before finding a state statute divisible. That is wrong. Although the Court has referred to the "elements" of a state offense in describing its approach, the Court has explained that what it meant by "elements" is the statutory definition of the offense, not a distinction between "elements" and "means."

The Court adopted the categorical approach in *Taylor* to ensure that the ACCA enhancement would apply to any defendant with a prior conviction for generic burglary, meaning burglary as it was "commonly understood" in most of the States. 495 U.S. at 597. To that end, the Court directed sentencing courts to compare "the statutory definition of the prior offense" to the definition of generic burglary to see if there is a match. *Id.* at 602. If the "statutory definition" is broader than generic burglary but includes alternative phrasing that corresponds to generic burglary, the statute is divisible. *Ibid.* The Court's example of a divisible statute (a state burglary statute that "include[s] entry of an automobile as well as a building") shows that divisibility depends only on the statute's text, not on any inquiry into "means." *Ibid.* That conclusion is confirmed by the absence of any inquiry in *Taylor* into state law to determine how the State classified the alternative phrases. It was

enough for the Court that the alternatives were listed in the statute. *Ibid.*

In explaining its approach, *Taylor* sometimes used the term "elements" to refer to the statutory definition of a state offense. 495 U.S. at 588-589, 601. But the Court did not distinguish between parts of the statutory definition that are "elements" and those that are "means" or suggest that such a distinction mattered in determining whether a statute is divisible. Rather, the Court used the phrases "statutory definition" and "elements" interchangeably, including in stating its holding. See *id.* at 602; see also, *e.g.*, Model Penal Code § 1.13(9) (1985) (defining "element of an offense" as including all items in the description of the offense). And when the Court did distinguish between "elements" and other terms, the context made clear that "elements" meant "statutory definition," rather than the state-law label (*i.e.*, whether the State called the offense "burglary" or "breaking and entering"), 495 U.S. at 588-589, or "the facts of each defendant's conduct," *id.* at 601.

In *Shepard*, the Court likewise based the applicability of the modified categorical approach on the statutory definition, not any inquiry into "means." As in *Taylor*, the Court used the phrases "statutory elements" and "statutory definition" interchangeably. *Shepard*, 544 U.S. at 16, 17. The Court reaffirmed that under the categorical approach, sentencing courts should compare the "statutory definition of the prior offense," which it also described as the "elements," with the definition of generic burglary. *Id.* at 17 (citation and internal quotation marks omitted). The Court did not distinguish between "elements" and "means" or suggest that such a distinction matters.

Rather, the Court reaffirmed the approach in *Taylor* and clarified which conviction documents a court may review under that approach. *Id.* at 16-17.

3. In *Descamps*, the Court again used "elements" to refer to the statutory definition of an offense. The Court did not purport to change its settled approach but instead said that it simply was applying that approach. 133 S. Ct. at 2283-2286. In explaining the approach, the Court expressly equated "statutory definitions" and "elements": "Sentencing courts may 'look only to the *statutory definitions*'—*i.e.*, *the elements*—of a defendant's prior offenses, and *not* 'to the particular facts underlying those convictions.'" *Id.* at 2283 (emphasis added) (quoting *Taylor*, 495 U.S. at 600). The Court explained that, under this approach, a state statute is "divisible" when its text sets out "multiple, alternative versions of the crime." *Id.* at 2284. Those alternative "statutory phrase[s]," the Court explained, allow a court to use conviction documents "to determine which statutory phrase was the basis for the conviction." *Id.* at 2285 (quoting *Johnson*, 559 U.S. at 144). Although the Court also used the word "elements" to describe divisibility, *e.g.*, *id.* at 2281, the context makes clear that the Court meant how the statute was phrased, not how state law would treat a verdict in a case where multiple theories of violating the statute are submitted to a jury. See *United States* v. *Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) (understanding that the Court used the word "elements" as a "shorthand" for the statutory text), cert. denied, 135 S. Ct. 1447 (2015).

Petitioner contends (Br. 21) that the Court adopted his approach to divisibility in *Descamps*. But the question presented in that case had nothing to do with

a state-law inquiry into "means." Rather, the question was whether the modified categorical approach could be used when a California statute was broader than generic burglary and did not include any alternative phrasing corresponding to generic burglary. 133 S. Ct. at 2281, 2285-2286. The statute criminalized "enter[ing]" certain locations with intent to commit theft but did not distinguish between unlawful entry (which corresponds to generic burglary) and lawful entry (which does not). *Id.* at 2282. That statute was not divisible, the Court explained, because it "define[d] burglary not alternatively, but only more broadly than the generic offense." *Id.* at 2283. As a result, a prosecutor would never be required to prove (or the defendant required to admit) that the defendant entered unlawfully, and so the conviction documents could not establish that the defendant had been convicted of generic burglary. *Id.* at 2285-2286.

Because the California statute failed to specify any alternative forms of entry, no question existed whether such an alternative form of entry would be a "means" or an "element" under state law. The Court mentioned "means" in this discussion only in repeating (and rejecting) the Ninth Circuit's explanation that it did not matter whether a state statute included "an *explicitly* finite list of possible means of commission" or "creates an *implied* list of every means of commission" by using an overbroad term. *Descamps*, 133 S. Ct. at 2289-2290 (quoting Ninth Circuit's decision). The Court explained that it does matter to divisibility whether the statutory text explicitly includes a list of alternatives; those alternatives set out what the jury must find (or the defendant must admit) to convict. *Id.* at 2286, 2290-2291.

Petitioner also relies (Br. 22-24) on a footnote of the Court's opinion, but that footnote disclaims petitioner's approach. In his dissenting opinion, Justice Alito had expressed concern that the Court's references to "elements" might be read to suggest that sentencing courts must ask whether statutory alternatives are "means" or "elements" under state law (*i.e.*, petitioner's approach). *Descamps*, 133 S. Ct. at 2297-2298. The Court refuted that suggestion, finding no "real-world reason" to worry about whether an alternative phrase is an "alternative means" or "alternative element":

> Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard*—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. at 2285 n.2. As in prior cases, the Court indicated that divisibility depends on whether a statute is "drafted in the alternative," and the Court rejected the view that a federal sentencing court must "parse state law" to determine whether an alternative phrasing represents a "means" or an "element." *Ibid.*

Petitioner suggests (Br. 23) that other language in the opinion establishes that a sentencing court always must ask whether an alternative phrase in a state statute is a means or an element. But the Court did not say that. Rather, as in *Taylor* and *Shepard*, it equated the statutory definition of an offense (the

"statutory phras[ing]") with "elements." *Descamps*, 133 S. Ct. at 2285 n.2 (citation omitted).[5] Only that explanation is consistent with the rest of the footnote, which explains that the distinction between means and elements does not matter to divisibility because a court need only look at the statutory text (*i.e.*, "whatever a statute lists"). *Id.* at 2285 n.2.

4. Both before and after *Descamps*, the Court has looked only to the statutory definition to decide whether a statute is divisible for purposes of the modified categorical approach. In none of its decisions has the Court distinguished between "elements" and "means" or suggested that a statute's divisibility turns on that distinction.[6] Instead, the Court reaffirmed that a statute is divisible, and therefore amenable to use of the modified categorical approach, if it is phrased in the "disjunctive," *Johnson*, 559 U.S. at 136,

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[5] The Court did the same thing elsewhere in its opinion when it distinguished between "elements" (the statutory definition) and the facts of a certain defendant's prior offense (which the Court called "legally extraneous circumstances" and "non-elemental fact[s]"). *Descamps*, 133 S. Ct. at 2288-2289. The Court did not refer to "means," and a statutory phrase that is a means of committing an offense is not an "extraneous circumstance"; it is a way to establish an element (and if only one means is charged, it is the element).

[6] See *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986-1988, 1990-1991 (2015); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013); *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012); *Sykes* v. *United States*, 564 U.S. 1, 6-7 (2011), overruled in part by *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *Johnson*, 559 U.S. at 144; *Nijhawan* v. *Holder*, 557 U.S. 29, 34-35 (2009); *Chambers*, 555 U.S. at 125-126; *Begay* v. *United States*, 553 U.S. 137, 141 (2008); *James* v. *United States*, 550 U.S. 192, 202 (2007), overruled in part by *Johnson*, 135 S. Ct. at 2563; *Duenas-Alvarez*, 549 U.S. at 186-187.

and therefore "separately describes" "different kinds of behavior," *Chambers*, 555 U.S. at 126. In those circumstances a court may look to approved conviction documents "to determine which statutory phrase was the basis for the conviction." *Johnson*, 559 U.S. at 144. The Court has repeatedly emphasized that the divisibility inquiry depends only on the "statutory definition" of the prior offense, *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 (2015); *Sykes* v. *United States*, 564 U.S. 1, 7 (2011), overruled in part by *Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *James* v. *United States*, 550 U.S. 192, 202 (2007), overruled in part by *Johnson*, 135 S. Ct. at 2563; see also *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013).

If petitioner were correct, it would mean that this Court's decisions were either materially incomplete or wrongly decided. That is true not just for *Taylor* and *Shepard*, but also for the numerous other decisions in which the Court has addressed the modified categorical approach. The Court plainly did not think that a state-law inquiry into "means" mattered to divisibility, or the Court would have mentioned it in at least one of its decisions. It never did. Nor did it conduct the often-difficult state-law inquiry into whether a certain statutory phrase represents a "means" or "element."

Petitioner's response (Br. 23) is that all of the Court's prior cases "were premised on the conclusion that those statutes' explicit lists of alternatives referred to elements, not means." But if the Court intended for sentencing courts to undertake a state-law analysis into "means" before finding a statute divisible, the Court would have said so (so that courts would know there is such a requirement), and likely would have undertaken the analysis (so courts would have an

example of what to do). And it is far from clear that the statutes in those cases actually involved elements, as opposed to means. See pp. 36-37, *infra* (Massachusetts burglary example). The fact that the Court has never undertaken the analysis petitioner advocates is strong evidence that no such analysis is required.

Further, the Court has repeatedly provided an example to illustrate divisibility, and that example is just like this case. In each one of its decisions addressing burglary under the ACCA, the Court hypothesized a state burglary statute that prohibits unlawful entry of "an automobile as well as a building." *Descamps*, 133 S. Ct. at 2284; see *Shepard*, 544 U.S. at 17; *Taylor*, 495 U.S. at 599. The Court explained that because "one of those alternatives (a building) corresponds to an element in generic burglary" but "the other (an automobile) does not," the statute is "divisible" because it "comprises multiple, alternative versions of the crime." *Descamps*, 133 S. Ct. at 2284; see *Shepard*, 544 U.S. at 17; *Taylor*, 495 U.S. at 599, 602. Petitioner now says (Br. 34-35) that some States treat the place being burgled as a "means," and in that circumstance, the state statute is not divisible at all. If petitioner's approach were correct, in many States, the Court's paradigmatic example of a divisible statute would not be divisible after all. It seems doubtful that the Court laid such a trap for the unwary.

C. Petitioner's Approach Is Not Necessary To Ensure That A Prior Conviction Is One For ACCA Burglary Or To Answer Constitutional Concerns

1. This Court has not required a court to determine whether a statutory alternative is a "means" or "element" before applying the modified categorical approach for good reason: it does not ultimately mat-

ter. The purpose of the modified categorical approach is to determine whether a prior conviction corresponds to a specified federal offense. *Taylor*, 495 U.S. at 599. When the statute of conviction lists alternative ways to commit an offense, the federal sentencing court must determine whether the defendant was convicted of an offense like the federal offense, *i.e.*, whether "the jury necessarily had to find" that the defendant committed the generic offense. *Id.* at 602. Doing so does not depend on whether the statutory alternative is a "means" or an "element." Rather, it depends on whether the conviction documents establish that the defendant was convicted of the generic offense, as opposed to something else. Put another way, the modified categorical approach itself provides the assurance that the defendant actually was convicted of the generic offense; no separate inquiry into "means" is necessary.

Consider two cases prosecuted under a state burglary statute that criminalizes unlawful entry (with the requisite intent) into a building or an automobile. See *Taylor*, 495 U.S. at 602. In the first case, the indictment charges the defendant with burgling a building, and no other place. If the judge or jury finds the defendant guilty of that charge, the conviction necessarily is one for generic burglary, because although the statute set out alternatives, only one alternative was charged, and so the factfinder "necessarily" had to find that alternative to convict. It does not matter whether the place being burgled was a means or an element under state law, because it was the only place alleged. Proof of the means is proof of the element, and no reason exists to distinguish between the two. See *Trent*, 767 F.3d at 1060 (The sentencing

court "can be sure that * * * the jury had to find that the statutory phrase was satisfied because there was no alternative ground available to it.").

In the second case, the indictment charges that the defendant burgled a building and an automobile, and the jury is instructed that it can convict by finding that the defendant burgled either place (*i.e.*, the type of place is a "means" rather than an "element"). If the jury finds the defendant guilty of burglary without specifying whether he burgled a building or an automobile, then the verdict does not "necessarily" establish that the defendant was convicted of generic burglary, and so the offense cannot be an ACCA predicate. *Taylor*, 495 U.S. at 599. But the reason the conviction is insufficient is not because the place being burgled is a "means" rather than an "element"—it is because the approved conviction documents do not establish that the defendant burgled a building, rather than an automobile.

Under petitioner's approach, in some States, neither conviction would qualify under the ACCA. His view is that the modified categorical approach cannot be used at all if the type of place burgled is a means under state law. So in the first case, a defendant who was charged with only burglary of a building under a statute that lists that alternative and was convicted of that offense would escape an ACCA enhancement if, in a hypothetical case where multiple places were charged, the jury would not be required to agree on the particular place burgled. That result makes no sense: the defendant was indisputably "found guilty of all the elements of generic burglary" (*Taylor*, 495 U.S. at 599), and how a different defendant "hypothetically *could have been* convicted" (*Descamps*, 133 S.

Ct. at 2288) should not matter. The defendant in the second case will not receive an ACCA enhancement, because his conviction documents do not establish that he was convicted of the version of the offense constituting generic burglary. But that does not justify exempting the first (and more typical) burglary case, where the statute lists alternatives, the defendant is charged with the generic alternative, and the "jury was actually required to find" that the defendant committed the generic offense. *Taylor*, 495 U.S. at 602; see *Descamps*, 133 S. Ct. at 2284 ("typical case" is where the prosecution charges only one of two alternative places). Just because "state law does not *always* require a jury to find" the type of place burgled "does not mean that a jury can *never* make such a finding or that a defendant can *never* admit to" it; "[i]n fact, that is precisely the function of the modified categorical approach: to determine whether the jury actually found or the defendant actually admitted the generic element." *United States* v. *Mayer*, No. 05-CR-60072, 2016 WL 520967, at *10 (D. Or. Feb. 5, 2016).

Petitioner contends (Br. 24-25) that the same argument could be made when the statute does not set out alternatives. But there is a critical distinction: when the statute does not specify alternatives, the jury would never be required to find (or the defendant to admit) one alternative, and so the federal sentencing court could not be sure that the defendant was convicted of generic burglary. The Court made this point in *Descamps* using a hypothetical statute prohibiting assault with a weapon: if the statute "criminalize[d] assault with any of eight specified weapons," and only assault with a gun qualified as an ACCA

predicate, a sentencing court could "check the charging documents and instructions" to determine whether the jury "necessarily found" that the defendant was convicted of the gun crime. *Descamps*, 133 S. Ct. at 2290. But if the statute required "only an indeterminate 'weapon,'" "that is all the indictment must (or is likely to) allege," "all the jury instructions must (or are likely to) mention," and "all the jury must find to convict the defendant." *Ibid.* Statutory alternatives matter because they set out what the jury is required to find; without such jury findings, a sentencing court would just be reviewing the "particular set of facts" in each defendant's case. *Descamps*, 133 S. Ct. at 2291.

Accordingly, ordinary application of the modified categorical approach ensures that an ACCA enhancement will apply only when the defendant's prior conviction necessarily was one for generic burglary. See *Rendon* v. *Holder*, 782 F.3d 466, 470 (9th Cir. 2015) (Graber, J., dissenting from denial of rehearing en banc) ("In all cases, the modified categorical approach will return a match *only* if we know that what the jury found is within the federal definition."). No need exists to engraft a separate state-law inquiry into "means" onto the Court's existing approach for determining whether a statute is divisible. All that would do is unfairly exempt defendants who actually were convicted of generic burglary.

2. Petitioner is likewise mistaken in contending (Br. 26-27) that his approach is required to avoid constitutional concerns. This Court has held that any fact, "[o]ther than the fact of a prior conviction," that increases the defendant's sentence beyond the otherwise-applicable statutory maximum must be proved to a jury beyond a reasonable doubt. *Apprendi* v. *New*

Jersey, 530 U.S. 466, 490 (2000); see *Blakely* v. *Washington*, 542 U.S. 296, 303 (2004) (for guilty plea, facts must be "admitted by the defendant"). In the context of the modified categorical approach, that means that when a state statute includes alternative phrasing, a federal sentencing court may rely only on certain approved conviction documents to "identif[y] the defendant's crime of conviction." *Descamps*, 133 S. Ct. at 2288. In doing so, the sentencing court does not conduct its "own review of the record" to find facts about the defendant's offense, but instead uses the statutory definition and conviction documents to determine what the jury necessarily found in the prior case. *Shepard*, 544 U.S. 24-25 (plurality opinion).

Petitioner contends (Br. 26-27) that a threshold state-law inquiry into "means" versus "elements" is required to avoid constitutional concerns. But the Court's limitations on use of the modified categorical approach already allay those concerns. In *Shepard*, the Court limited the documents that can be used under the modified categorical approach to those with "conclusive significance" so sentencing courts would not make "disputed finding[s] of fact" about the prior offense. 544 U.S. at 25 (plurality opinion). The Court explained that a sentencing court may not review police reports or complaint applications because those documents might include disputed facts and therefore cannot demonstrate that the offense "necessarily involved * * * facts equating to generic burglary." *Id.* at 24 (plurality opinion) (internal quotation marks omitted); see *id.* at 20-21. These limitations apply in every case, without regard to whether a statutory phrase is a "means."

Accordingly, no Sixth Amendment concerns arise when a defendant is convicted of violating a disjunctive statute that sweeps more broadly than the ACCA definition of generic burglary and the federal sentencing court looks to his conviction documents to check that he was convicted of the generic offense. As the Court recognized, if a state statute prohibits burglary of a building or an automobile, the government charged burglary of a building and the jury convicted on that charge, the federal sentencing court "can be sure the jury * * * found" the fact that the defendant burgled a building. *Descamps*, 133 S. Ct. at 2284, 2288-2289.

Petitioner's argument assumes that a "means" is always a "legally extraneous fact[]." Br. 21; see Br. 22, 24-25. But in the cases like this one, where the prosecutor charged only one means and the defendant was found guilty of that charge, the factfinder necessarily had to find that each element was established beyond a reasonable doubt, and so the constitutional principle set out in *Apprendi* is satisfied. It does not matter that the alternative charged and proven in this case might be a "means" on which the jury could disagree in a different case.

3. None of petitioner's other proffered reasons justifies his proposed approach. Petitioner asserts (Br. 28) that the Court's settled approach is a difficult one because it requires "an inquiry into the facts" in each defendant's case. That is wrong; the Court's approach "look[s] only to the statutory definitions of the prior offenses" to determine if a statute is divisible, *Taylor*, 495 U.S. at 600, and then looks only to certain reliable conviction records to determine whether a defendant's conviction under a divisible statute was for the generic

federal offense, *Shepard*, 544 U.S. at 17. And if conviction documents do not clarify which version of the offense formed the basis for the conviction (Pet. Br. 28), then the prior conviction does not qualify under the ACCA. No separate, state-law inquiry into "means" is needed to protect against inquiry into facts.

Petitioner contends (Br. 29-30, 31-32) that allowing an enhancement when a statutory alternative is a "means" would deprive defendants of the benefits of their plea deals and make it difficult for defense attorneys to provide advice about whether a prior conviction could qualify as an ACCA predicate. But those criticisms depend on petitioner's assumption that the defendant pleaded guilty to a state offense that "d[id] not match" the elements of ACCA burglary. *Descamps*, 133 S. Ct. 2289. When the defendant's prior offense *does* match ACCA burglary (because the jury actually found or the defendant admitted an unlawful entry of a building or structure to commit a crime), then "there can be no unfairness" because the defendant "knew which statutory phrase formed the basis for the conviction." *Trent*, 767 F.3d at 1060; see *Mellouli*, 135 S. Ct. at 1987. It does not matter whether the statutory phrase represents a means or an element.

Petitioner also argues (Br. 30) that when state law defines two offenses, one of which is narrower than generic burglary and one of which is broader, and the defendant is convicted under the broader statute, it would be unfair to deem his conviction one for "burglary" under the ACCA. But since *Taylor*, it has been clear that a defendant's prior offense may qualify as generic burglary not only when the state statute is the

same (or narrower) than generic burglary, but also when the state statute is broader than generic burglary, so long as the statute is divisible and the conviction documents establish that the defendant was convicted of the alternative corresponding to generic burglary. 495 U.S. at 599. Petitioner's criticism is one of the modified categorical approach itself.

Finally, petitioner asserts (Br. 30-31) that defining divisibility based on the statutory definition would lead to unwarranted disparities among States. But the example he provides is not about whether a statutory phrase is a "means" or an "element"; it is about whether, in determining the scope of a state offense, a sentencing court should review judicial rulings interpreting the statute's text—a question the Court reserved in *Descamps*. See 133 S. Ct. at 2291. The Court has employed the same rule for divisibility for at least 20 years; if this rule created anomalous results, one would expect to see evidence of that. And petitioner's approach would create unjustified sentencing disparities among similarly situated defendants. By basing the ACCA's applicability on a state-law distinction between "means" and "elements," petitioner's approach would exempt from the statute's reach defendants who actually had been convicted of generic burglary. Cf. *Taylor*, 495 U.S. at 590-591 (finding it "implausible" that Congress intended the applicability of the ACCA to turn on state-law labels when defendants were convicted based on "exactly the same conduct").

D. Petitioner's Approach Would Create Significant Practical Difficulties And Thwart The Statute's Purposes

1. Determining whether a certain statutory phrase represents a "means" or "element" under state law

can be a difficult undertaking. State legislatures do not routinely specify whether a part of a statute is a "means" or an "element," leaving that question to be decided by the state courts on a statute-by-statute, phrase-by-phrase basis. See *Schad*, 501 U.S. at 636; see also, *e.g.*, *Fulmer* v. *State*, 401 S.W.3d 305, 311 (Tex. Ct. App.), cert. denied, 134 S. Ct. 436 (2013); *State* v. *Shaw*, 281 P.3d 576, 582 (Kan. Ct. App. 2012); *State* v. *Peterson*, 230 P.3d 588, 591 (Wash. 2010). And the issue does not arise with frequency in state courts, because it does not matter in the "typical case" of burglary, where a defendant is charged and tried only on one theory, not multiple theories. See *Descamps*, 133 S. Ct. at 2284; *Richardson*, 526 U.S. at 818.

As a general matter, the only way for a federal court (or a federal immigration judge) to know with certainty that a statutory phrase represents a "means" is to find an authoritative state court decision holding that when a jury was instructed on multiple theories corresponding to alternative phrases and the jury returned a guilty verdict but did not pick between the two theories, the verdict was permissible. See *Descamps*, 133 S. Ct. at 2298 (Alito, J., dissenting). Absent such a decision, a federal sentencing court (or immigration judge) would have to decide in the first instance whether a state legislature intended to require a jury to agree on a specific alternative when multiple alternatives are charged.

That is no easy task: whether a statutory phrase represents a means or an element is "a substantial question of statutory construction," *Schad*, 501 U.S. at 636 (plurality opinion), which often depends on a multi-factor inquiry, see *Richardson*, 526 U.S. at 820 (considering "language, tradition, and potential un-

fairness" to decide whether language in 21 U.S.C. 848 was a means or element); see also, *e.g.*, *State* v. *West*, 362 P.3d 1049, 1056-1057 (Ariz. Ct. App. 2015) (listing other factors). As one state supreme court has explained, "[t]here simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." *Peterson*, 230 P.3d at 591 (citation omitted); see also, *e.g.*, *State* v. *Brown*, 284 P.3d 977, 987 (Kan. 2012) (court describes its own definition of "alternative means" as "oblique[]" and "mind-bending in its application" and observes that it "has led to confusion and disagreement among panels of the Court of Appeals"). Yet under petitioner's view, federal sentencing courts (and immigration judges) would have to decide these state-law issues of first impression every day, even in the most routine cases.

2. An example illustrates the difficulties with petitioner's approach. This Court has, on many occasions, provided a Massachusetts burglary statute as an example of a divisible statute. See *Descamps*, 133 S. Ct. at 2284; *Nijhawan* v. *Holder*, 557 U.S. 29, 35 (2009); *Chambers*, 555 U.S. at 126; *Duenas-Alvarez*, 549 U.S. at 186-187; *Shepard*, 544 U.S. at 16-17. That statute criminalizes breaking into a "building, ship, vessel, or vehicle." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2014); see also *id.* §§ 16A, 17, 18 (containing similar lists). The statute is divisible, the Court has explained, because its text sets out alternative places. *E.g.*, *Nijhawan*, 557 U.S. at 35.

Petitioner assumes (Br. 31 n.12) that the Massachusetts statute is divisible. But he does not explain why. Determining whether the place being burgled is

a means under Massachusetts law requires determining whether jurors would have to agree on the type of place burgled, in a case that charges multiple places, to convict. Like Justice Alito, the government has not found any authoritative state decision answering that question. See *Descamps*, 133 S. Ct. at 2298 (Alito, J., dissenting). Massachusetts cases say what "the elements * * * are," but they generally repeat the statutory language and do not address the distinction between means and elements. See, *e.g.*, *Commonwealth* v. *Cabrera*, 874 N.E.2d 654, 657 (Mass. 2007). The Massachusetts model jury instructions are likewise unhelpful: they list each place in the alternative but they do not address whether the jury must be unanimous on the type of place when more than one place is charged.[7] It is accordingly unclear whether the Massachusetts burglary statute would be divisible under petitioner's approach. On this "means" question, like many others, a federal sentencing court would have to guess as to the state legislature's intent.

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[7] The relevant instruction provides: "The defendant in this case is charged with breaking and entering a (building) (ship) (vessel) (vehicle) in the nighttime, with the intent to commit a felony. * * * In order to prove the defendant guilty[,] the Commonwealth must prove four things beyond a reasonable doubt: * * * *First*: That the defendant broke into a (building) (ship) (vessel) (vehicle) belonging to another person; * * *" Mass. Crim. Model Jury Instruction 8.100 (2009 ed.). There also is a general unanimity instruction, and its commentary states that a jury need not unanimously agree on an "alternative method" for committing an offense. Mass. Crim. Model Jury Instruction 2.320 & comment. (rev. Jan. 2013). But the commentary does not specify whether the type of place burgled is such a method. And in any event, jury instructions are not necessarily an authoritative construction of state law.

Other statutes that this Court has assumed are divisible might not be under petitioner's approach. For example, the Court in *Descamps* assumed that a state statute criminalizing "assault with any of eight specified weapons" would be divisible. 133 S. Ct. at 2290. But some States treat the type of weapon as a means, rather than an element. See, *e.g.*, *Meredith* v. *United States*, 343 A.2d 317, 320 (D.C. 1975) (per curiam) (addressing D.C. Code § 22-3202 (1973)). Similarly, in *United States* v. *Castleman*, 134 S. Ct. 1405 (2014), the Court assumed that a state assault statute is divisible based on mental state. *Id.* at 1414. Yet the Court has recognized that alternative mental states are often treated as "means" under state law. See *Schad*, 501 U.S. at 632; see also *State* v. *Klinge*, 994 P.2d 509, 519-520 (Haw. 2000) (citing cases).

3. The experience in the courts of appeals that have adopted petitioner's approach provides additional evidence of the approach's shortcomings. For example, the Ninth Circuit has struggled in applying this approach. After a panel of the court of appeals adopted this approach, believing it required by *Descamps*, see *Rendon* v. *Holder*, 764 F.3d 1077, 1082-1083 (9th Cir. 2014), seven judges "emphatically dissent[ed]" from the denial of rehearing en banc, explaining that the prior textual approach to divisibility "is in no way problematic" and the court's new approach "sows confusion in our existing caselaw" and leads to "absurd[]" results, 782 F.3d at 467, 470-473 (Graber, J.).[8]

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[8] Judge Kozinski agreed that the panel's opinion "has led [the court] badly astray" and suggested a different approach, which looks to the *Shepard* documents to determine whether a statutory phrase is a means. *Rendon*, 782 F.3d at 474 (Kozinski, J., dissent-

As one example, these judges discussed use of the modified categorical approach to determine whether a state drug offense qualifies as a controlled substance offense under federal law. Many state drug laws include, on their lists of controlled substances, drugs that do not appear on the federal schedules. See *Mellouli*, 135 S. Ct. at 1984. Because the state laws are broader than federal law, courts must determine whether a defendant's prior state conviction corresponds to a federal offense. *Rendon*, 782 F.3d at 472 (Graber, J., dissenting from denial of rehearing en banc). This Court has assumed that the modified categorical approach can be used to answer that question. *Mellouli*, 135 S. Ct. at 1986-1987. But under petitioner's approach, these drug statutes may not be divisible by drug type.

"[D]espite thousands of drug convictions over decades of enforcement, there is no California court case on point answering whether a jury must be unanimous in th[e] exceedingly unusual circumstance" that drug type is charged in the alternative. *Rendon*, 782 F.3d at 472 (Graber, J., dissenting from denial of rehearing en banc); see *ibid.* ("In nearly every drug conviction in California, there is only one substance at issue."). And if the court determined that, "in the abstract, juror unanimity is not required"—*i.e.*, drug type is a "means" under state law—the result would be that the court "must ignore *all* California drug convictions in *every* context, even if everyone agrees that there was

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ing from denial of rehearing en banc). But he acknowledged that his approach has "its own set of problems." *Ibid.* The jury-unanimity question depends on interpreting state law, and an indictment alone cannot authoritatively answer that question. See *United States* v. *Howard*, 742 F.3d 1334, 1343 n.3 (11th Cir. 2014).

only one substance in the case at hand." *Ibid.* The judges noted that, before *Descamps*, the circuit had treated such state drug statutes as divisible, and one panel had relied on that holding post-*Descamps*. Although that panel characterized drug type as an element, not a means, under California law, *Coronado* v. *Holder*, 759 F.3d 977, 985 n.4 (2014), cert. denied, 135 S. Ct. 1492 (2015), another circuit judge observed that state law is not clear and suggested that the court of appeals "certify the jury unanimity question to the Supreme Court of California." *United States* v. *Ramirez-Macias*, 584 Fed. Appx. 818, 820 (9th Cir. 2014) (unpublished) (Hawkins, J., concurring), cert. denied, 136 S. Ct. 181 (2015). The inability of these court of appeals judges to determine the divisibility of drug statutes that federal sentencing courts confront every day demonstrates the unworkability of petitioner's approach.

The experience in the Fourth Circuit is similar. Circuit judges have struggled to determine whether an alternative is a means under state law, compare *Omargharib* v. *Holder*, 775 F.3d 192, 198-200 (2014) (concluding that type of taking in state larceny statute is a means), with *id.* at 200 (Niemeyer, J., concurring) (finding it "especially difficult" to discern whether the type of taking is a means), and have disagreed about what to do when state law is unclear, compare *United States* v. *Vinson*, 794 F.3d 418, 425-427 (4th Cir.), superseded on rehearing by 805 F.3d 120 (2015), with *id.* at 431-434 (Gregory, J., dissenting). As one judge remarked, the court of appeals' "ever-morphing analysis" and "increasingly blurred articulation of applicable standards" has "applie[d] a confusing layer" to

the modified categorical approach. *Omargharib*, 775 F.3d at 200, 202 (Niemeyer, J., concurring).

Federal district judges and immigration judges use the modified categorical approach every day in a variety of different contexts. See *James*, 530 U.S. at 215 (Scalia, J., dissenting). They "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not." *Almanza-Arenas* v. *Lynch*, No. 09-71415, 2016 WL 766753, at *9 (9th Cir. Feb. 29, 2016) (en banc) (Watford, J., concurring). Yet in the circuits where it has been adopted, petitioner's approach has failed to yield any "clear and workable standards." *Omargharib*, 775 F.3d at 200 (Niemeyer, J., concurring).[9] The result is more work for the courts and more arbitrary results for defendants.

4. Adopting petitioner's approach would severely undermine the ACCA's purposes. Congress enacted the ACCA to supplement States' law enforcement efforts by providing enhanced penalties for federal defendants who have repeatedly been convicted of serious crimes. *Taylor*, 495 U.S. at 581. Congress focused on burglary in particular because it is one of

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[9] See also, *e.g.*, *Almanza-Arenas*, 2016 WL 766753, at *9 (Owens, J., concurring) ("The only consistency in these cases is their arbitrariness."); *Rendon*, 782 F.3d at 473 (Graber, J., dissenting from denial of rehearing en banc) (lamenting the "undue and unsupported complicating of the modified categorical approach"); *Mayer*, 2016 WL 520967, at *10 (Ninth Circuit's approach "unnecessarily complicates the modified categorical approach" by requiring a federal court to determine "if the relevant state law requires a hypothetical jury to find the alternative elements in every hypothetical case"); *Murray* v. *United States*, No. 15-CV-5720, 2015 WL 7313882, at *5 (W.D. Wash. Nov. 19, 2015) ("The undersigned notes that this area of law is a hopeless tangle.").

the "crimes most frequently committed by * * * career criminals" and often involves violence. *Id.* at 581, 585. The Court developed a categorical approach in order to ensure that the ACCA would reach the definition of burglary "used in the criminal codes of most States." *Id.* at 598.

Yet petitioner's approach would call into question whether convictions under many state burglary statutes could ever qualify as ACCA predicates. Petitioner contends that Iowa's burglary statute cannot qualify because it prohibits unlawful entry into an "occupied structure," and then defines "occupied structure" with a list that contains items corresponding to generic burglary and some that do not.[10] That is a common formulation: it is used in the Model Penal Code, §§ 221.0, 221.1 (1980),[11] and in the criminal codes of many States.[12] And it is the type of statute ("a bur-

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[10] Petitioner is mistaken in suggesting (Pet. 7) that a court may not consider statutory definitions in deciding whether a state offense is divisible. This Court routinely uses cross-referenced definitions to determine the scope of crimes. See, *e.g.*, *Castleman*, 134 S. Ct. at 1413.

[11] *Taylor* cited the Model Penal Code's formulation as an example of the type of statute that could be the basis for an ACCA enhancement. 495 U.S. at 598 n.8.

[12] See Colo. Rev. Stat. §§ 18-4-101, 18-4-202, 18-4-203 (2015); Mont. Code Ann. §§ 45-2-101, 45-6-201, 45-6-204 (2015); N.H. Rev. Stat. Ann. § 635.1 (LexisNexis 2015); N.D. Cent. Code §§ 12.1-22-02, 12.1-22-06 (2012); Ohio Rev. Code Ann. §§ 2909.01, 2911.11-2911.13 (LexisNexis 2014); 18 Pa. Cons. Stat. Ann. §§ 3501, 3502 (West 2015); S.D. Codified Laws §§ 22-1-2, 22-32-1, 22-32-3, 22-32-8 (2006 & Supp. 2015); Wyo. Stat. Ann. §§ 6-1-104, 6-3-301 (2015). These are not the only state statutes that would be affected by petitioner's approach: the approach would apply to any statute that is broader than generic burglary, whether through a defined term, see, *e.g.*, Ky. Rev. Stat. Ann. §§ 511.010, 511.020, 511.040

glary statute * * * that prohibits 'entry of an automobile as well as a building'") that this Court has already described as divisible in several decisions. *Descamps*, 133 S. Ct. at 2284 (quoting *Taylor*, 495 U.S. at 602). Yet, aside from the decision petitioner has identified for Iowa, the government has been unable to locate any published state decision definitively resolving whether the type of place burgled under these statutes is a "means" or an "element."[13] And even if a few such decisions exist, they do not demonstrate that petitioner's approach is a workable one for the vast majority of States or the vast majori-

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(LexisNexis 2014) (defining "building" to include vehicles), or through a list of places that includes non-generic options, see, *e.g.*, 720 Ill. Comp. Stat. Ann. § 5/19-1 (West Supp. 2015).

[13] The government has identified some cases that come close but do not definitively resolve the issue. See, *e.g.*, *State* v. *Horner*, No. 43549-7-II, 2014 WL 1746074, at *4-*5 (Wash. Ct. App. Apr. 29, 2014) (unpublished) (calling the place being burgled an "alternative means" but then stating that it must be proven unanimously, which would only be true for an element), and *State* v. *Linehan*, 56 P.3d 542, 546 (Wash. 2002) (stating that "[d]efinition statutes do not create additional alternative means" but then citing cases stating that definition statutes do not create alternative *elements*), cert. denied, 538 U.S. 945 (2003); see also *State* v. *Smalls*, 519 S.E.2d 793, 795-796 (S.C. Ct. App. 1999) (holding that a particular type of building need not be charged in the indictment).

Petitioner's ability to find a decision addressing the issue in Iowa does not show that it can be done as a routine matter. Petitioner cited no state law to the district court and did not cite the decision on which he now relies (*State* v. *Duncan*, 312 N.W.2d 519 (Iowa 1981)) to the court of appeals; the case appeared for the first time in his merits brief in this Court. Petitioner's belated identification of a relevant state decision confirms that the task is not an easy one.

ty of crimes that carry sentencing or immigration consequences under federal law.

Petitioner's approach would take this Court far afield from where it started in *Taylor*. Instead of reaching burglary convictions from "most States," *Taylor*, 495 U.S. at 598, the ACCA may not reach many such convictions at all. Instead of the categorical approach functioning as an "on-off switch," *Descamps*, 133 S. Ct. at 2287, a federal district court (or immigration judge) would have to "delve[] into the nuances of" state law to determine whether a state statute is even divisible, *id.* at 2285 n.2. And instead of incapacitating career criminals who have repeatedly been convicted of burglary (such as petitioner), the approach would exempt precisely those defendants Congress intended to reach.

E. The Iowa Burglary Statute Is Divisible

1. Applying the correct approach, the Iowa burglary statute at issue is divisible. The Iowa statute prohibits any person from unlawfully "enter[ing]" (or breaking into or remaining in) "an occupied structure" with the "intent to commit a felony, assault or theft therein." Iowa Code § 713.1 (1989). The term "occupied structure" is defined by an exclusive list: "any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place" that is used for overnight accommodations, business, or storage. *Id.* § 702.12.

The state burglary definition is broader than generic burglary because it covers not only unlawful entry into a "building" or "structure," but also unlawful entry into other places, such as "vehicle[s]." Iowa Code Ann. § 702.12 (1989). The state statute is divisible because it is phrased in the disjunctive and identi-

fies a finite number of alternative places that can be burgled. *Ibid.* As the district court recognized, the statute's list of alternatives is "exactly what makes it a divisible statute and allows the Court to go to the modified categorical approach." J.A. 29. Because the statute specifies alternative versions of the offense, at least one of which matches generic burglary, it is possible to use *Shepard* documents to confirm that a defendant was convicted of the generic offense (*i.e.*, entering a "building" or "structure") rather than a non-generic one (*i.e.*, entering a "vehicle").[14] Indeed, the Iowa statute is precisely the type of burglary statute that this Court already has found divisible. See, *e.g.*, *Taylor*, 495 U.S. at 602 (modified categorical approach applies when state burglary statute applies to automobiles as well as buildings); see p. 26, *supra*.

2. Petitioner's five convictions qualify as convictions for ACCA "burglary" under the modified categorical approach. The charging document for each conviction specifies that petitioner burgled a "building" or "structure," not any other type of place. See J.A. 60, 62-63, 65-66, 68-69, 71-72. Petitioner pleaded guilty to four of these offenses, and a jury found him guilty of the fifth. J.A. 61, 64, 67, 70, 73; PSR ¶¶ 37, 49-52; see *United States* v. *Broce*, 488 U.S. 563, 570

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[14] Petitioner contends (Br. 33, 35) that the definition of "occupied structure" merely provides a non-exhaustive, illustrative list of places that may qualify. He is mistaken. The statute sets out a disjunctive, finite list of places that are occupied structures and says that an occupied structure "is" a place on that list, not that an occupied structure "includes" a place on that list. Iowa Code § 702.12 (1989); see, *e.g.*, *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' excludes any meaning that is not stated." (citation omitted)).

(1989) (by pleading guilty, a defendant "admi[ts] that he committed the crime charged against him" (citation omitted)); Iowa R. Crim. P 2.8(2)(b) (court may not accept a guilty plea without first determining that it has a factual basis).[15] Petitioner's federal sentence therefore was correctly enhanced under the ACCA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[15] Petitioner suggests (Br. 9 n.5, 11, 28-29) that the basis for his prior convictions is unclear because the government introduced only charging documents for his prior offenses. He is mistaken: the conviction records include "recorded judicial acts of th[e] court" (*Shepard*, 544 U.S at 20) establishing that petitioner had been convicted of the charged offenses. See J.A. 61, 64, 67, 70, 73. In any event, petitioner never argued below that the documents provided by the government were inadequate to establish his convictions for the charged crimes, see Def.'s Sent. Mem. 4-6, and he has forfeited any such argument by failing to raise it in his certiorari petition.

APPENDIX

1. 18 U.S.C. 922 provides, in pertinent part

Unlawful acts

* * * * *

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

* * * * *

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

* * * * *

2. 18 U.S.C. 924 provides, in pertinent part:

Penalties

* * * * *

(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not

suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct

that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

3. Iowa Code § 702.12 (1989) provides:

Occupied structure

An "*occupied structure*" is any building, structure, appurtenances to buildings and structures, land, water or air vehicle, or similar place adapted for overnight accommodation of persons, or occupied by persons for the purpose of carrying on business or other activity therein, or for the storage or safekeeping of anything of value. Such a structure is an "occupied structure" whether or not a person is actually present. However, for purposes of chapter 713, a box, chest, safe, changer, or other object or device which is adapted or used for the deposit or storage of anything of value but which is too small or not designed to allow a person to physically enter or occupy it is not an "occupied structure."

4. Iowa Code § 713.1 (1989) provides:

Burglary defined

Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license or privilege to do so, enters an occupied structure, such occupied structure not being open to the public,

or who remains therein after it is closed to the public or after the person's right, license or privilege to be there has expired, or any person having such intent who breaks an occupied structure, commits burglary.

5. Iowa Code § 713.3 (1989) provides:

Burglary in the first degree

A person commits burglary in the first degree if, while perpetrating a burglary, the person has in the person's possession an explosive or incendiary device or material, or a dangerous weapon, or intentionally or recklessly inflicts physical injury on any person. Burglary in the first degree is a class "B" felony.

6. Iowa Code § 713.15 (1989) provides:

Burglary in the second degree

All burglary which is not burglary in the first degree is burglary in the second degree. Burglary in the second degree is a class "C" felony.

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UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

This Court has held that a criminal statute is "divisible" for ACCA purposes, and thus susceptible to the modified categorical approach, only if it "sets out one or more *elements of the offense* in the alternative." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013) (emphasis added). The government nonetheless argues (at 7) that any criminal statute that contains the word "or" is subject to the modified categorical approach, even if the disjunctive list merely illustrates different means of committing a single offense. The government coins its own phrase for such a statute—"textually divisible," a term this Court has never used. Br. 2, 6, 7, 11, 15, 16. The government's resort to neologism only confirms that the Court has never applied the modified categorical approach as the government wishes, and it should not start now.

I. A Statute Of Conviction Is Divisible Only If It Lists Alternative Elements, Not Alternative Means

A. This Court's Decisions Establish That Only Alternative Elements Make A Statute Divisible

1. This Court could not have rejected the government's position more clearly: "a divisible statute[] list[s] potential offense *elements* in the alternative." *Descamps*, 133 S. Ct. at 2283 (emphasis added); *see also, e.g., id.* at 2281 ("an 'indivisible' statute—*i.e.*, one not containing alternative *elements*" (emphasis added)); *id.* (a "divisible statute ... sets out one or more *elements of the offense* in the alternative" (emphasis added)). The Court similarly stated in *Johnson* v. *United States* that a statute is divisible when "the elements of the offense are disjunctive." 559 U.S. 133, 136 (2010). (The government's reliance on *Johnson* depends on misleadingly quoting only the word "disjunctive" while omitting the preceding words "the elements of the offense are." Br. 24.)

In criminal law, an offense "element" refers to an allegation that a jury must find beyond a reasonable doubt (or a defendant must admit) in order to permit a conviction for that offense. A "jury ... cannot convict unless it unanimously finds that the Government has proved each element." *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); *see also* Pet. Br. 18-21. Elements differ from the "means" of commission, which are the "possible sets of underlying brute facts [that] make up a particular element." *Richardson*, 526 U.S. at 817. Jurors are *not* "required to agree upon a single means of commission," *Schad* v. *Arizona*, 501 U.S. 624, 631-632 (1991) (plurality opinion)—even where possible means are stated explicitly in the statute, as they were in the

Arizona law at issue in *Schad*, *id.* at 628 n.1. Likewise, a guilty plea "is an admission of all the elements of a formal criminal charge," not of the particular means stated in the charging instrument or plea. *McCarthy* v. *United States*, 394 U.S. 459, 466 (1969); *see also, e.g.*, *North Carolina* v. *Alford*, 400 U.S. 25, 37 (1970) (defendant may plead guilty without "admit[ting] his participation in the acts constituting the crime").

The government denies none of this, but insists that this Court's repeated reference to "elements" in *Descamps* deviated from the term's established meaning and included means of commission as well. The government's argument is unpersuasive. The Court distinguished between elements and means, citing *Richardson* and emphasizing that "the only facts the court can be sure the jury ... found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances." *Descamps*, 133 S. Ct. at 2288 (citing 526 U.S. at 817). Justice Alito recognized as much in dissent. *Id.* at 2296 ("By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction."); *see also id.* at 2298 (citing *Schad* and *Richardson*). In reply, the Court did not say that Justice Alito had misunderstood the difference between elements and means or that, as the government argues (at 23), the difference did not matter for divisibility purposes. On the contrary, the Court stuck to the traditional usage of those terms, and explained that its prior decisions were consistent with, and depended upon, the distinction between elements and means: "All those decisions rested on the explicit premise that the laws contained statutory phrases that cover several different ... crimes"—which is possible only if the alternatives are genuine elements, "not sev-

eral different methods of committing one offense." 133 S. Ct. at 2284-2285 & n.2 (brackets and internal quotation marks omitted); *see also id.* at 2285 n.2 (if "the state laws at issue in" *Taylor*, *Shepard*, and *Johnson* "set out 'merely alternative means, not alternative elements' of an offense," that "would have been news to the *Taylor*, *Shepard*, and *Johnson* Courts"). And the Court contemplated consulting *Shepard* documents to resolve doubts about whether the statutory alternatives were "elements or means" only because, the Court stated, those documents might help identify "the crime's *elements*." *Id.* (emphasis added).

Other passages in *Descamps* confirm that, when the Court wrote "elements," it meant elements. The Court stated that "when a statute lists multiple, alternative elements, [it] effectively creates 'several different ... crimes.'" *Id.* at 2285; *see also id.* at 2285 n.2 (same). A list of alternative means does not create several crimes. *Id.* at 2285 n.2. The Court also wrote that a "prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives," *id.* at 2290; by contrast, a prosecutor may include several alternative means in a single count, even if the several means are expressly listed in the statute. Pet. Br. 18-20; *Schad*, 501 U.S. at 631 ("an indictment need not specify which overt act, among several named, was the means by which a crime was committed"); Fed. R. Crim. P 7(c)(1) (a single count of an indictment may allege the means of commission in the alternative).

Descamps drew the importance of elements not from thin air, but from the text and history of ACCA itself. By making a sentence enhancement turn on "convictions," 18 U.S.C. § 924(e)(1), not conduct, ACCA reflects a "deliberate decision to treat every conviction

of a crime in the same manner," meaning that "*a prior crime* would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287 (emphasis added). Congress's decision is effectuated by ensuring that a statute setting forth only one crime defined by one set of "elements of the offense" is evaluated categorically against the generic offense, and its status as an ACCA predicate does not vary depending on what assertions happen to be in the *Shepard* documents.

2. The government does not explain why the Court in *Descamps* would have been confused about or indifferent to the clear distinction between elements and means that the Court has otherwise been so careful to maintain. Nor does the government explain how its reading of the Court's repeated references to "elements" can be reconciled with the unique role the elements of an offense play in charging and proving a crime. References to the offense's "statutory definition" do not help the government (*e.g.*, Br. 7, 9, 19, 20); after all, a crime is defined by its elements, not by additional words in a statute that a jury need not consider in order to convict. "[C]rimes are made up of factual elements," *Richardson*, 526 U.S. at 817; anything else describes "amplifying but legally extraneous circumstances," *Descamps*, 133 S. Ct. at 2288.

The government argues, without citation, that explicit "[s]tatutory alternatives matter because they set out what the jury is required to find." Br. 29-30. The lack of cited authority is unsurprising; as discussed, a jury is only "required to find" elements, not means. *E.g.*, *Descamps*, 133 S. Ct. at 2288 ("the only facts the court can be sure the jury ... found are those constituting elements of the offense"). The government "nowhere explains how a factfinder can have 'necessarily

found' a non-element," whether that non-element is expressly listed in the statute or not. *Id.* at 2286 n.3.

The government invokes (at 29-30) the Court's hypothetical discussion in *Descamps* of a law "criminaliz[ing] assault with any of eight specified weapons," 133 S. Ct. at 2290, under which a jury would be required to find a specific alternative weapon. But the Court's discussion shows that the weapons listed in the hypothetical statute were elements, not means of commission. Not only did the Court expressly refer to each specific weapon as an alternative "element," *see* 133 S. Ct. at 2290 (the prosecutor "must generally select the relevant *element* from its list of alternatives" (emphasis added)), but it also expressly stated that "the jury ... must then find that element[] unanimously," *id.*, which is not true of means of commission.[1]

3. The government argues (at 25) that, if divisibility depended on whether alternative phrases were elements or means, the Court would have said so before *Descamps*. That argument is indistinguishable from one position advanced in the *Descamps* dissent and rejected by the Court. The "explicit premise" of *Taylor*, *Shepard*, and *Johnson*, the Court ruled, was that the laws at issue "contained statutory phrases that cover several different ... crimes, not several different methods of committing one offense." *Descamps*, 133 S. Ct. at 2285 n.2 (alterations and internal quotation marks omitted).

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[1] The Court's example of a hypothetical statute that prohibits burglary of a building or an automobile (Resp. Br. 32) does not help the government either, because the Court defined the building and the automobile as "elements of the offense in the alternative." *Descamps*, 133 S. Ct. at 2281.

And in any event, the government's dog-that-didn't-bark theory is flawed: in prior cases, either the parties did not dispute divisibility, or there was no need for the Court to inquire into it (that need exists only when the statute of conviction is broader than the generic offense *and* the proffered *Shepard* documents indicate that the factual basis of the conviction conforms to the generic offense). In *Taylor* v. *United States*, it was unclear what Missouri statute was even at issue. 495 U.S. 575, 602 (1990). In *Shepard* v. *United States*, the Court assumed that the modified categorical approach applied, and decided only what documents could be considered under that approach. 544 U.S. 13, 16 (2005). In *Johnson*, the Court held that the assumed basis of the conviction did not conform to the generic offense. 559 U.S. at 137-143; *see also Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1687 (2013) (same); *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1984, 1986 n.4 (2015) (same, and the government did "not argue[] that this case falls within the compass of the modified-categorical approach"); *Chambers* v. *United States*, 555 U.S. 122, 126, 127-128 (2009) (parties agreed on statute's divisibility, and basis of conviction did not conform to generic offense). In *James* v. *United States*, the parties did not dispute that the second-degree burglary statute was divisible between "dwelling" and occupied "structure or conveyance," and the Court did not need to decide whether "dwelling" itself was divisible because it found that it was not overbroad. 550 U.S. 192, 212-213 & n.7 (2007) (holding that "curtilage," an aspect of the statute's definition of "dwelling," was within the generic residual-clause offense), *overruled by Johnson* v. *United States*, 135 S. Ct. 2551, 2563 (2015); *see also United States* v. *Castleman*, 134 S. Ct. 1405, 1414 (2014) ("parties do not contest that [the statute] is a 'divisible

statute'"); *Sykes* v. *United States*, 564 U.S. 1, 5-6, 13-15 (2011) (no apparent dispute about divisibility); *id.* at 17 (Thomas, J., concurring in the judgment) (referring to the "elements of" the statute).

4. The government also contends that "where the defendant is charged on only one theory[]" (Br. 18), "the factfinder 'necessarily' had to find that alternative to convict" (Br. 27). The government's "theory of the case" approach is indistinguishable from the approach applied by the Ninth Circuit in *Descamps* and definitively rejected by this Court.

Notably, the government's "theory of the case" argument does not turn on whether the charged "theory" is explicit or implicit in the statute, and thus would have yielded the opposite outcome in *Descamps* were it correct. The *Shepard* documents relating to Mr. Descamps's prior conviction (an information and plea colloquy) contained government assertions that he had committed burglary by unlawfully entering a building to commit a felony therein—conduct that would have met the generic definition of burglary. *Descamps*, 133 S. Ct. at 2282 ("At the plea hearing, the prosecutor proffered that the crime 'involve[d] the breaking and entering of a grocery store,' and Descamps failed to object to that statement."); JA14a-15a, *Descamps*, 2012 WL 7746771 (2012) (information alleging that the defendant "wilfully, unlawfully and feloniously enter[ed] a building"). The Ninth Circuit determined that Mr. Descamps's prior conviction conformed to the generic offense based on its decision in *United States* v. *Aguila-Montes de Oca*, where it had explained that if the statute requires "the use of a gun or an axe," and "if the indictment alleges only that the defendant used a gun, and the only prosecutorial theory of the case (as ascertained exclusively through the relevant *Shepard* docu-

ments) is that the defendant used a gun," "then we can be confident that if the jury convicted the defendant, the jury found that the defendant used a gun rather than an axe." 655 F.3d 915, 936 (9th Cir. 2011) (en banc); *see also id.* at 936-937 ("[I]n the plea context, if the only weapon the defendant admitted to using was a gun, then we can be confident that the trier of fact was 'required' to find that the defendant used a gun in the course of assaulting the victim."). The Ninth Circuit, like the government here, believed that the modified categorical approach could be used because it "asks what facts the conviction 'necessarily rested' on in light of *the theory of the case* as revealed in the relevant *Shepard* documents." *Id.* at 937 (emphasis added).

This Court abrogated the Ninth Circuit's "theory of the case" approach, which "turns an elements-based inquiry into an evidence-based one" and asks "not whether 'statutory definitions' *necessarily* require an adjudicator to find the generic offense, but instead whether the prosecutor's case realistically led the adjudicator to make that determination." *Descamps*, 133 S. Ct. at 2287 (emphasis added); *see also id.* at 2286 n.3. This Court held that *Shepard* documents may not be considered to determine "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Id.* at 2288. The categorical approach (and its modified variant) "focus[] on the *legal* question of what a conviction necessarily establishe[s]" in *all* cases of conviction for the same crime; it does not permit a *factual* determination of the theory that the prosecution asserted in a particular case. *Mellouli*, 135 S. Ct. at 1987 (emphasis altered); *see Descamps*, 133 S. Ct. at 2281, 2293; *James*, 550 U.S. at 214 ("In determining whether attempted burglary under Florida law

qualifies as a violent felony under § 924(e)(2)(B)(ii), the Court is engaging in statutory interpretation, not judicial factfinding."); *Moncrieffe*, 133 S. Ct. at 1688-1689 (court considers offense of conviction "in the abstract, not the actual ... offense being prosecuted").

Thus, it made no difference "[w]hether Descamps *did* break and enter," *Descamps*, 133 S. Ct. at 2286, "whether he ever admitted to breaking and entering," *id.*, or whether the prosecution *said* without objection that he broke and entered, *id.* at 2282. Rather, what mattered was that *the California burglary statute*, Cal. Penal Code § 459—"the crime of which he was convicted—d[id] not require the factfinder (whether jury or judge) to make that determination." *Id.* at 2293. The prosecution cannot change what the *statute requires* simply by asserting a particular means of commission as its theory of the case. When a jury convicts after being presented with a single theory of the case, or when a defendant pleads guilty to an indictment alleging a single theory of the crime, the *Shepard* documents "[a]t most" demonstrate that the defendant "committed" the generic crime, "and so hypothetically *could have been* convicted under a law criminalizing that conduct." *Id.* at 2287-2288. "But that is just what [this Court] said, in *Taylor* and elsewhere, is not enough" for the conviction to qualify under ACCA. *Id.* at 2288.

If, as the government believes, correspondence between the defendant's conviction and generic burglary could be established by *Shepard* documents where the state statute defines a single offense that can be committed by multiple means, then Mr. Descamps would have lost in this Court. It makes no difference that California's burglary statute covers nongeneric means of commission through *silence* (*Descamps*), whereas Iowa's statute does so through an express provision (this

case). In both situations, a conviction can be obtained without the prosecution charging, the defendant admitting, or a jury finding an element of generic burglary; and in both cases, *Shepard* documents mentioned extraneous facts corresponding to generic burglary.

The government has shown no principled reason to treat this case any differently from *Descamps*. The Court should reject the government's unfounded, artificial distinction between the two cases and reaffirm that a statute is divisible only when it contains alternative elements and thus defines different crimes, not when it sets out possible alternative means of committing a single crime.

B. The Government's Position Would Revive The Constitutional And Practical Problems That Made The Categorical Approach Necessary

1. As *Descamps* noted, one reason for the Court's "insistence on the categorical approach" is to avoid the "serious Sixth Amendment concerns" that would arise if the sentencing court's finding of an ACCA predicate offense "went beyond merely identifying a prior conviction." 133 S. Ct. at 2288; *see also Shepard*, 544 U.S. at 25 (plurality opinion); *id.* at 28 (Thomas, J., concurring in part and concurring in judgment). The categorical approach—including its modified form—prevents a sentencing court from determining "what the defendant and state judge must have understood as the factual basis of the prior plea, or what the jury in a prior trial must have accepted as the theory of the crime." *Descamps*, 133 S. Ct. at 2288 (internal quotation marks omitted). Instead, they permit the sentencing court to perform the purely *legal* inquiry into the *elements* of the crime of conviction and compare them to the generic offense. *James*, 550 U.S. at 214 ("[B]y applying *Tay-*

lor's categorical approach, we have avoided any inquiry into the underlying facts of James' particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law. Such analysis raises no Sixth Amendment issue."). As Mr. Mathis showed (Br. 26-27), the same constitutional concerns require limiting the modified categorical approach to statutes setting out alternative elements, not means.

The government responds (at 31-32) that these concerns are avoided as long as only "conclusive" record documents are considered, by which the government evidently means those showing that "the prosecutor charged only one means and the defendant was found guilty of that charge," for then "the factfinder necessarily had to find that each element was established beyond a reasonable doubt."

Once again, the government's argument (were it valid) would have changed the result in *Descamps*, where the prosecution charged only one means (unlawful entry). In fact, the government's argument is yet another rehash of the Ninth Circuit's rejected "theory of the case" approach, which "flout[ed]" the Court's Sixth Amendment reasoning "by extending judicial factfinding beyond the recognition of a prior conviction." 133 S. Ct. at 2288. As the Court observed, "the only facts the court can be sure the jury ... found are those constituting elements of the offense." *Id.* Therefore, "[w]hatever the underlying facts or the evidence presented"—whatever the prosecution's theory of the case—it is only as to *elements* that the defendant is "convicted, in the deliberate and considered way the Constitution guarantees." *Id.* at 2290. An approach in which the sentencing court relies "on its own finding about a non-elemental fact to increase a defendant's maximum sentence" under ACCA—the Ninth Circuit's

approach in *Descamps* as much as the government's here—cannot be squared with the Sixth Amendment. *Id.* at 2288-2289.

The government does not explain why the presence of statutorily explicit alternatives in Iowa's burglary statute should make a constitutional difference. Rather, unless the alternatives are elements of the crime, a sentencing court's inferences regarding means of commission produce the same constitutionally impermissible factfinding rejected in *Descamps*.

2. The government's approach also revives the inequities that this Court properly avoided. This Court recognized that "[t]he meaning of [*Shepard*] documents will often be uncertain," and their "statements of fact ... may be downright wrong." *Descamps*, 133 S. Ct. at 2289. Defendants "often ha[ve] little incentive" to ensure the factual accuracy of such documents as to "facts that are not elements of the charged offense—and may have good reason not to," including inadvertently admitting guilt and irritating the judge with disputes that have no bearing on the adjudication of the charge. *Id.* For example, an Iowa defendant charged with burglarizing a garage would be unlikely to argue that he actually burglarized a car parked outside the garage. *See also* AILA Br. 28-29 (listing examples of irrelevant means). Moreover, as Mr. Mathis explained (Br. 28-29), Iowa charging documents—the only relevant *Shepard* documents in this case—are prone to error for reasons that are not unique to Iowa. The government does not even respond to these concerns, much less explain how a sentencing court could tell whether charging documents accurately stated a means of commission.

The government's approach would also result in defendants convicted of the same crime being treated dif-

ferently depending on what the *Shepard* documents in their cases happen to say about the means of commission. That is at odds with Congress's intent that "ACCA ... function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287.

The government separately has precious little to say about the plea context, notwithstanding that "ninety-four percent of state convictions are the result of guilty pleas." *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). This Court recognized in *Descamps* that the government's factual approach would "deprive some defendants of the benefits of their negotiated plea deals" because it would treat convictions as ACCA predicates even where the defendant "plead[ed] guilty to a less serious crime, whose *elements* do not match an ACCA offense." 133 S. Ct. at 2289 (emphasis added). As Mr. Mathis demonstrated (Br. 29-30), the government's approach in this case creates the same problem.

The government contends (at 33) that there would be no unfairness as long as the *Shepard* documents reveal that the "prior offense *does* match" the generic offense because then "the defendant 'knew which statutory phrase formed the basis for the conviction.'" But that would have been true in *Descamps* too, where the charging document and plea colloquy referred only to facts within the generic offense. This case illustrates the same concern, in that the only record documents relied upon are charging documents, which do not reveal what (if any) facts Mr. Mathis actually admitted.[2]

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[2] The government misses the point in suggesting (at 46 n.15) that Mr. Mathis "forfeited" any argument that the *Shepard* documents in this case "were inadequate to establish his convictions for the charged crimes." Although the *Shepard* documents in this case

3. Mr. Mathis noted (Br. 30-31) that the government's approach would create irrational disparities across States that criminalize exactly the same conduct. The government (at 34) tries to dodge the point by misconstruing it as raising the question whether "a sentencing court should review judicial rulings." The point is that, under the government's approach, the statute of conviction in hypothetical State A will be divisible, while the one in State B will not, solely because the alternative means were legislatively codified in State A but developed judicially in State B. The result is that two defendants, convicted of substantively identical crimes under substantively identical criminal laws, will be treated differently under ACCA based solely on the *form* of the statute of conviction, not its actual reach. The government has no response.

The government also argues (at 34) that "basing the ACCA's applicability on a state-law distinction between 'means' and 'elements'" would create interstate disparities. But *that* kind of disparity comes naturally from the fact that, where one State's law lists alternative elements and another lists alternative means, the States have created *different crimes*. *Descamps*, 133 S. Ct. at 2285 & n.2. Any disparity in ACCA's application to different crimes "is the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant 'commit[s],' but rather [on] what facts are necessarily established by a conviction for the state offense." *Moncrieffe*, 133 S. Ct. at 1693 n.11. Moreover, as Mr. Mathis noted (Br. 31 n.12),

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are indeed inadequate to that task, Mr. Mathis pointed to them to illustrate the danger in using *Shepard* documents (especially charging documents alone) to determine whether a defendant admitted a particular means of commission, because such documents often do not reflect an ultimate plea's factual basis. Pet. Br. 28-29.

allowing for this disparity respects the States' decisions about how to define crimes. States are of course free, though not obligated, to amend their laws to clarify whether any alternatives are elements or means and thus to determine how they are treated for ACCA purposes. And if Congress is dissatisfied with ACCA's reach, it is free to alter it. *See Descamps*, 133 S. Ct. at 2293-2294 (Kennedy, J., concurring).[3]

C. Distinguishing Between Elements And Means Does Not Create The Problems The Government Claims It Does

1. The government says (at 43 n.13) that the "task" of determining whether statutory alternatives are elements or means "is not an easy one"—even as it concedes that *State* v. *Duncan*, 312 N.W.2d 519 (Iowa 1981), resolves the question in this case.[4] And Iowa is not unique in this regard; many States' courts have specifically decided whether a criminal statute sets out elements or means. *E.g.*, *People* v. *Vigil*, __ P.3d __, 2015 WL 4042473, at *5, 7 (Colo. Ct. App. 2015) (holding that jury need not agree on whether defendant burglarized trailer, tractor, shop, or lean-to because specific place was a means, not an element); *State* v. *Pipkin*, 316

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[3] Because ACCA is a federal sentencing law reflecting federal criminal policy, its reach (whatever it may be) places no burden on the States to modify their laws in any particular way. The States' policy interests are fully addressed by the criminalization and sentencing that their own laws provide. Indeed, States may prefer to increase the likelihood of conviction by relieving juries of the obligation to agree on certain facts, even at the cost of disqualifying the offense as an ACCA predicate.

[4] Identifying *Duncan* was a matter of reviewing relevant criminal law treatises. *See* 4 Iowa Practice Series, *Criminal Law* § 10:4 n.9 (2015); 23A C.J.S. *Criminal Law* § 1882 nn.3, 6 (2016); 42 C.J.S. *Indictments* § 206 n.4 (2016).

P.3d 255, 260 (Or. 2013) (holding that "entering and remaining unlawfully" in burglary statute are means, not "separate elements"); *State* v. *Peterson*, 230 P.3d 588, 591 (Wash. 2010) (holding that sex offender registration statute set out alternative means, not elements); *State* v. *Seymour*, 515 N.W.2d 874, 876 (Wis. 1994) (employee theft statute "describe[d] independent offenses rather than simply delineating methods by which the same offense may be committed"); *see also* AILA Br. 12-21 (collecting decisions from various jurisdictions).

Where state decisional law is unavailable, the sentencing court will interpret the statute of conviction for itself. But statutory interpretation is no unfamiliar task for federal courts. For example, this Court has analyzed state law in cases involving the categorical approach, including by examining state statutes and case law. *See, e.g.*, *Castleman*, 134 S. Ct. at 1413-1415. There is no reason to think the federal courts could not do the same with respect to the divisibility analysis. Indeed, federal courts already distinguish elements from means when assessing the sufficiency of an indictment or drafting a jury instruction. *See, e.g.*, *United States* v. *Damrah*, 412 F.3d 618, 622-623 (6th Cir. 2005) (deciding that 18 U.S.C. § 1425 sets out alternative means, not elements); *United States* v. *Lee*, 317 F.3d 26, 36 (1st Cir. 2003) (distinguishing elements of 18 U.S.C. § 1029(a)(3) from "brute facts that constitute those elements"). In some instances, the text of the criminal statute will make clear whether alternatives are means or elements. *See* AILA Br. 31 (listing examples). For example, where the statute provides different penalties for different alternatives, *Apprendi* dictates that the alternatives are elements. *See, e.g.*, Vt. Stat. Ann. tit. 13, § 1201. And where the list is non-exhaustive, it is likely that the alternatives are illustrative means rather

than elements. *United States* v. *Lockett*, 810 F.3d 1262, 1268 (11th Cir. 2016); *United States* v. *Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014).

Where state case law and statutory text are inconclusive, it may also be appropriate for federal courts to look to other sources, such as pattern jury instructions, model verdict forms, or commentaries. *See, e.g.*, *Almanza-Arenas* v. *Lynch*, __ F.3d __, 2016 WL 766753, at *8 (9th Cir. Feb. 29, 2016) (en banc) (consulting pattern jury instructions); *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015) (same); *Lockett*, 810 F.3d at 1271 (same). *Shepard* documents may also be helpful for this task, at least where they confirm that the alternatives are means. *Descamps*, 133 S. Ct. at 2285 n.2; *see also* Pet. Br. 24 & n.9. If need be, the question can often be certified to the highest court of the relevant State.[5]

The government claims (at 38-41) that the experience of the Ninth and Fourth Circuits, which support Mr. Mathis's position, evidences that approach's "shortcomings." On the contrary, they demonstrate its workability.

The government's presentation of the Ninth Circuit's decisions is decidedly incomplete. It mentions Judge Graber's 2015 dissent from denial of rehearing en banc in *Rendon* v. *Holder*, 782 F.3d 466 (9th Cir. 2015), which addressed the proper approach for determining divisibility, but neglects to mention that the Ninth Circuit later *granted* rehearing en banc on the same issue and had no trouble reading *Descamps* as it should be

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[5] If none of these tools permits the sentencing court to distinguish elements from means, it should avoid any Sixth Amendment concern by assuming that the statute of conviction did not "necessarily require an adjudicator to find the generic offense," *i.e.*, by treating the alternatives as means. *Descamps*, 133 S. Ct at 2287.

read. *Almanza-Arenas*, 2016 WL 766753. The en banc court added that "[l]ooking to state law to determine a state's interpretation of its own statutes is nothing new," and noted that this Court had carefully examined state law in *Descamps* and *Johnson*, 559 U.S. 133. *Almanza-Arenas*, 2016 WL 766753, at *6. Nor did the court have any trouble applying this rule: looking to the statutory text, charging documents, and state law, it ruled that the relevant California criminal statute was indivisible because it set out alternative means. *Id.* at *1.[6]

The government fears (at 39-40) that judges on the Ninth Circuit would conclude that California drug statutes that list several controlled substances disjunctively "may not be divisible by drug type." Br. 39. The government's prophecy has not come to pass. The Ninth Circuit has repeatedly held that California drug laws are divisible because they require the jury to agree on the particular type of drug, *i.e.*, the drug type is an element. *See, e.g.*, *Coronado* v. *Holder*, 759 F.3d 977, 984-985 (9th Cir. 2014) (drug possession under Cal. Health & Safety Code § 11377(a)); *Padilla-Martinez* v. *Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014) (possession for sale under Cal. Health & Safety Code § 11378); *Tobias de Mota* v. *Lynch*, __ F App'x __, 2015 WL 8735900, at *1 (9th Cir. Dec. 15, 2015) (possession for sale under Cal. Health & Safety Code § 11375(b)); *see*

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[6] The government also gets Judge Kozinski's separate opinion in *Rendon* wrong. Like Mr. Mathis, Judge Kozinski maintained that if "the statutory alternative was simply a means of committing the offense," the modified categorical approach would not apply. *Rendon*, 782 F.3d at 473 (Kozinski, J., dissenting from denial of rehearing en banc). Judge Kozinski also argued that "*Descamps* permits [the court] to peek at the *Shepard* documents in order to determine" whether the alternatives are elements or means. *Id.*

also United States v. *De la Torre-Jimenez*, 771 F.3d 1163, 1166 (9th Cir. 2014) (Graber, J.) (possession for sale under Cal. Health & Safety Code § 11351); *United States* v. *Huitron-Rocha*, 771 F.3d 1183, 1184 (9th Cir. 2014) (Graber, J.) (possession and transportation under Cal. Health & Safety Code § 11352(a)).

Similarly, the Fourth Circuit had no trouble applying the proper approach in *Omargharib* v. *Holder*, where, contrary to the government's suggestion (at 40), the court was unanimous that the alternatives in the Virginia larceny statute at issue were "means ..., not ... elements." 775 F.3d 192, 200 (4th Cir. 2014); *see also id.* at 200 (Niemeyer, J., concurring) ("I am pleased to concur in [the court's] well-crafted opinion[.]").

In any event, that judges may disagree over whether a statute's alternatives are elements or means does not vitiate the approach. Courts that apply the modified categorical approach routinely disagree about what the *Shepard* documents reveal in particular cases, but the government hardly finds that problematic. *Compare United States* v. *Espinoza-Morales*, 621 F.3d 1141, 1149 (9th Cir. 2010) (concluding that *Shepard* documents did not establish convictions to be crimes of violence), *with id.* at 1153-1154 (Walter, D.J., dissenting) (concluding the opposite); *compare Cisneros-Perez* v. *Gonzales*, 465 F.3d 386, 392-394 (9th Cir. 2006) (concluding *Shepard* documents did not establish predicate offense), *with id.* at 395-396 (Callahan, J., dissenting) (concluding the opposite); *see also* AILA Br. 28-29 (discussing effort needed to ascertain alleged facts from *Shepard* documents).

2. Finally, the government's claim (at 41-42) that Mr. Mathis's position undermines ACCA's purposes lacks merit. Some States have burglary crimes that

categorically match generic offenses and will remain ACCA predicates. *E.g.*, Miss. Code Ann. § 97-17-23 (breaking and entering "the dwelling house or inner door of such dwelling house of another"); Okla. Stat. Ann. tit. 21, § 1431 (breaking and entering "the dwelling house of another"); Wash. Rev. Code Ann. § 9A.52.025 (unlawful entry into or remaining in "a dwelling other than a vehicle"). Convictions under statutes setting out alternative elements will trigger the modified categorical approach and qualify as long as the conviction was for a crime conforming to the generic offense. And again, if Congress is dissatisfied with ACCA's interaction with state law, it may amend the relevant provisions (as may States, if they wish).

II. IOWA'S OVERBROAD BURGLARY STATUTE IS INDIVISIBLE, SO THE LOWER COURTS ERRED IN APPLYING THE MODIFIED CATEGORICAL APPROACH

The government agrees (at 44) that Iowa's definition of burglary "is broader than generic burglary" because it encompasses places besides a "'building'" or "'structure.'" The government also concedes (at 43 & n.13) that the Supreme Court of Iowa has "definitively resolv[ed]" that the different places listed in the burglary statute are means rather than elements. Together, those concessions resolve this case. The Iowa burglary law under which Mr. Mathis was convicted is indivisible, and the lower courts erred in using the modified categorical approach.[7]

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[7] The government is correct (Br. 5 n.1), and Mr. Mathis's opening brief (at 7 n.2) overlooked the fact, that the district court found Mr. Mathis's prior conviction for "interference with official acts" to be an ACCA predicate. *See* JA35. The error is immaterial, as the government must establish two additional predicate offenses, and none of Mr. Mathis's burglary convictions qualifies.

CONCLUSION

The judgment of the court of appeals should be reversed, Mr. Mathis's sentence vacated, and the case remanded.

Respectfully submitted.

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IN THE SUPREME COURT OF THE UNITED STATES

No. 15-6092

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

Pursuant to this Court's Rule 15.8, the United States submits this supplemental brief to address a decision handed down after the filing of the government's brief in response to the petition for a writ of certiorari

On December 17, 2015, the government filed a brief agreeing that the petition should be granted to resolve a conflict among the courts of appeals concerning the circumstances in which courts may employ the "modified categorical approach" set out in Taylor v. United States, 495 U S 575 (1990), and Descamps v United States, 133 S Ct 2276 (2013)

On December 28, 2015, the United States Court of Appeals for the Ninth Circuit, sitting en banc, issued a decision in Almanza-Arenas v Lynch, No 09-71415, 2015 WL 9462976, that further entrenches that conflict. In the course of reviewing a decision of the Board of Immigration Appeals, the en banc court in Almanza-Arenas considered when it is permissible to utilize the "modified categorical approach" in order to determine whether a defendant was convicted of an offense that satisfies a generic federal definition triggering immigration or criminal consequences

In line with the panel decision in Rendon v Holder, 764 F 3d 1077 (9th Cir 2014), the en banc court concluded that when a state statute sets out several forms of an offense in the alternative, some of which satisfy the generic definition and some of which do not, courts may find the statute "divisible" and thus may examine conviction records to determine which form of the offense was the basis for a conviction only if, under state law, jurors would be required in every case to be unanimous as to the form of the offense that a defendant had committed Slip op. 13-25 The court stated that the first step is to examine the text of the statute to ascertain whether its alternative, disjunctive phrasing creates "means" or "elements " Id. at 15-16 Next, a court should confirm its interpretation by examining the conviction documents "to see

whether the statute displays alternative elements," on which jurors must agree unanimously in order to return a conviction, "instead of alternative means of committing the same crime," on which jurors need not agree unanimously to convict. Id. at 16. Finally, the court stated, courts should look to state law, "to verify whether a state statute has elements or means." Id. at 20; see id. at 18-25

The en banc court acknowledged that its approach conflicted with the approaches of other courts of appeals See slip op 21 ("We recognize that not all of our sister circuits agree that courts should look to state law to determine a statute's elements following Descamps."). In particular, it acknowledged that the Tenth Circuit in United States v Trent, 767 F 3d 1046, 1061 (2014), cert denied, 135 S. Ct. 1447 (2015), had adopted a purely textual approach in analyzing when the modified categorical approach may be applied. Slip op 21 And it stated that while the Fifth Circuit had not directly "addressed the elements versus means distinction," id. 21 n 17, that court had stated that, contrary to the en banc court's approach, a "divisible statute is one defined 'alternatively, with one statutory phrase corresponding to the generic crime and another not,'" id. at 21 (quoting Franco-Casasola v Holder, 773 F 3d 33, 37-38 (5th Cir 2014))

Four of the ten judges who joined the majority opinion stated in a concurrence that they did so "because it correctly applies our precedent," but added that they did "not agree that our precedent is correct " Slip op 26; see id. at 26-27. The concurring opinion, authored by Judge Owens and joined by Judges Tallman, Bybee, and Callahan, stated that "[u]nder the current framework, hardened criminals avoid removal due to the vagaries of one state's law, while much softer individuals get shipped overseas because of the indictment template used in a different office." Id. at 26. While expressing the view that congressional involvement would be necessary to remedy the "arbitrariness" of the current system, the concurrence stated that this Court might need first "to wipe the slate clean by junking the current state of law " Ibid.

Judge Watford concurred in the judgment, setting forth his view that the approach of the en banc court was "inconsistent with the approach required by Descamps v United States " Slip op 27; see id. at 27-40. In Judge Watford's view, Descamps established that a statute was divisible, so that the modified categorical approach could be applied, "whenever the statute itself specifies, in the alternative, multiple ways a particular element can be satisfied." Id. at 30. Judge Watford emphasized that "questions of divisibility" arise "frequently * * * in both the criminal and immigration contexts " Id. at 28 As a

result, he stated, courts "need a clear and easy-to-apply rule for distinguishing between statutes that are divisible and those that are not " Ibid. He expressed the hope that "the Supreme Court will step in to provide further guidance" concerning divisibility. Ibid.

Because this en banc decision further entrenches the circuit conflict concerning when the modified categorical approach may be applied, the decision confirms the grounds for granting the petition for a writ of certiorari in this case.

* * * * *

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

DECEMBER 2015

No. 15-6092

IN THE SUPREME COURT OF THE UNITED STATES

RICHARD MATHIS, PETITIONER

v.

UNITED STATES OF AMERICA

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served with copies of the **SUPPLEMENTAL BRIEF OF THE UNITED STATES**, via email and first-class mail, postage prepaid, this 30th day of December, 2015.

[See Attached Service List]

Donald B. Verrilli, Jr./SKRB

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December 30, 2015

Due to the continuing delay in receiving incoming mail at the Department of Justice, in addition to mailing your brief via first-class mail, we would appreciate a fax or email copy of your brief. If that is acceptable to you, please fax your brief to Charlene Goodwin, Case Management Supervisor, Office of the Solicitor General, at (202) 514-8844, or email at **SupremeCtBriefs@USDOJ.gov.** Ms. Goodwin's phone number is (202) 514-2217 or 2218. Thank you for your consideration of this request.

15-6092
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Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND INDIVIDUALS WITH PENDING IMMIGRATION APPEALS RAISING THE QUESTION PRESENTED, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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Tex. Penal Code § 22.01(b) 31

Tex. Penal Code § 22.01(c) 31

Va. Code Ann. § 18.2-95 19

Other Authorities

Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (June 2015), http://www.uscourts.gov/file/18457/download 27

Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf 26

Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis In Immigration Law*, 86 N.Y.U.L. Rev. 1669 (2011) 6

Ingrid V Eagly. *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126 (2013) 34

Ingrid V Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1 (2015) 24

Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law, 111th Cong. 56 (2010) 27

Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States (2011), https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united 25

Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigration L.J. 257 (2012) 27

Stephen Lee, *De Facto Immigration Courts*, 101 Cal. L. Rev. 553 (2013) 33, 34

10 Minn. Prac., Jury Instruction Guides—Criminal § 13.106 (6th ed. 2015) 29

Nat'l Immigrant Justice Ctr., Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court (2010), https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf.....25

Statement of Juan P Osuna, Director of the Executive Office of Immigration Review, Before the House Committee on the Judiciary (Dec. 3, 2015) http://judiciary.house.gov/_cache/files/467e5f9e-e9e9-4141-99be-5c24cac1db55/osunatestimony.pdf.....27

Policies and Procedures, Judicial Records Center, Rhode Island (2013), https://www.courts.ri.gov/JudicialRecordsCenter/PDFs/PoliciesProcedure.pdf.....26

Eli Saslow, *In A Crowded Immigration Court, Seven Minutes To Decide A Family's Future*, Washington Post (Feb. 2, 2014).....32

U.S. Dep't of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2013 (2014), https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.....24

U.S. Dep't of Justice, Executive Office of Immigration Review, FY 2014 Statistics Yearbook (2015), http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf 23, 24, 27

U.S. Gov't Accountability Office, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities (2007), http://www.gao.gov/assets/270/263327.pdf.....26

U.S. Immigration & Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards, https://www.ice.gov/detention-standards/2011.....25, 26

INTRODUCTION AND INTEREST OF AMICI[1]

In encouraging the Court to grant certiorari, the Government emphasized the importance of the question presented "not only" to sentencing law, "but also ... in the immigration context." U.S. Cert. Br. 22. The categorical approach applies equally under immigration law, and "the approach to divisibility will often determine whether [a noncitizen] who has committed a ... crime may remain in the country." *Id.* at 23. This brief addresses the immigration half of the equation.

The Court's decision will directly affect the individual amici's pending immigration appeals, as well as those of other noncitizens represented by the organizational amici and their members. Their cases vividly illustrate why the Eighth Circuit's approach to divisibility is incompatible with both *Descamps v. United States*, 133 S. Ct. 2276 (2013), and the prerogative of the States to define their own crimes (*infra* § I), why it would cause serious and unfair practical difficulties for those facing removal proceedings and for the immigration system as a whole (*infra* § II), and why it would require criminal defense attorneys representing noncitizens to burden state criminal proceedings with precisely the sorts of disputes *Descamps* sought to avoid (*infra* § III).

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

In his pending Fifth Circuit immigration appeal, **Hermenegildo Gomez-Perez** raises the question presented here. *See Gomez-Perez v. Lynch*, No. 14-60808 (5th Cir., argued and submitted Nov. 3, 2015). Sixteen years ago, Gomez-Perez was convicted of a misdemeanor assault offense for which he served only probation. The Texas statute under which he was convicted proscribes "intentionally, knowingly, or recklessly causing bodily injury." Immigration law treats an intentional or knowing assault as a crime involving moral turpitude, but not a reckless assault. The Texas Court of Criminal Appeals has held, however, that "intentional assault" is not a separate crime from "knowing assault" or "reckless assault" under Texas law, and thus a jury could divide 6-6 on the mental state. In Texas, the terms are not alternative elements defining different crimes, but only different means of committing a single crime; defining a single, broad offense this way makes it easier for juries to convict. Accordingly. Gomez-Perez was "convicted of" only the unitary crime of causing bodily injury with at least a reckless mens rea—an offense that is not a crime involving moral turpitude under federal law.

Disregarding how Texas has elected to define its criminal offense, the Board of Immigration Appeals (BIA) held that the statute is divisible merely because it contains the word "or," echoing the Eighth Circuit's erroneous focus in this case on disjunctive phrasing rather than elements. The BIA thus applied the modified categorical approach and concluded that the conviction rendered Gomez-Perez ineligible for cancellation of removal, so it could not even consider the hardship his removal would cause his three U.S.-citizen children.

Vera Sama has been a lawful permanent resident for 14 years. Her case is pending before the Attorney General, who referred the question presented here to herself after the BIA applied the Fourth Circuit's divisibility rule in Sama's favor. *See Matters of Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (AG 2015). Sama was convicted under a Maryland statute that defines "theft" to include several forms of conduct. Some correspond to generic "theft," an aggravated felony under the Immigration and Nationality Act (INA), and some do not. Maryland's highest court has held, however, that a jury need not agree on which enumerated form of theft a defendant committed. Indeed, the Maryland Legislature brought the different a ts together under one "consolidated" statute precisely to eliminate the "subtle distinctions" that had complicated prosecutions when they were separate crimes. The statute is therefore not divisible under *Descamps*. Yet, under the Eighth Circuit's rule, Maryland's deliberate decision to "consolidate" would be ignored, the modified categorical approach would apply, and a lawful permanent resident could be deported based on an alleged fact that was immaterial to her conviction under state law—a conviction for which she too served no time in prison.

Other noncitizens represented or counseled by amici the **American Immigration Lawyers Association**, the **Immigrant Defense Project**, and the **National Immigration Project of the National Lawyers Guild** (each described in Addendum A), and by amici's members, would similarly face severe consequences under the Eighth Circuit's approach. Facts that they were never actually *convicted* of would lead not only to removal, but also to ineligibility for

discretionary relief like cancellation of removal or asylum.

Descamps leaves no room for the Eighth Circuit's approach. *Descamps* held that a statute is divisible, such that the modified categorical approach applies, *only if* it lists multiple alternative elements, meaning facts a jury would have to agree upon and find beyond a reasonable doubt. As *Descamps* explained, this formal-elements rule is the only reason the modified categorical approach does not violate the Sixth Amendment in the sentencing context. It is also the only reason the modified categorical approach is consistent with the INA's focus on what noncitizens were "convicted of," not what acts they committed. *Descamps*'s element-centric approach best serves the INA's overriding goal of ensuring uniform, predictable, and fair treatment of prior convictions.

The Eighth Circuit's approach, in contrast, would disregard legislative choices made by the States. And it would cause factual embellishments that were never "necessarily" established in state court to yield grave downstream immigration consequences, as the examples described in this brief illustrate. Scouring the record of conviction for "non-elemental facts" directly contradicts *Descamps*, and it is a time-consuming enterprise that would unduly burden noncitizens and already-overstretched immigration courts. Worse still, it would result in noncitizens who have each been *convicted of* the same offense receiving different treatment depending on what record documents still exist or what they happen to describe about the means by which an offense was committed. *Descamps* aimed to prevent precisely these types of "'daunting'

difficulties and inequities." The Eighth Circuit's nullification of *Descamps* should be rejected, and *Descamps*'s formal-elements rule of divisibility should be reaffirmed.

ARGUMENT

I. *Descamps*'s Formal-Elements Rule Ensures Uniformity, Predictability, And Fairness In The Application Of The Immigration Laws.

A. Evenhanded treatment of prior convictions has long been a central aim of both immigration and sentencing law.

The categorical approach and "its modified partner" apply equally in the sentencing and immigration contexts. *Descamps*, 133 S. Ct. at 2286; *see, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (applying *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), and *Johnson v. United States*, 559 U.S. 133 (2010)). That is because both the Armed Career Criminal Act (ACCA) and "the INA ask[] what offense [an individual] was 'convicted' of, not what acts he committed." *Moncrieffe*, 133 S. Ct. at 1685 (internal citation omitted); *see Descamps*, 133 S. Ct. at 2287 ("ACCA increases the sentence of a defendant who has three 'previous convictions' for a violent felony—not a defendant who has thrice committed such a crime."). "'[C]onviction' is 'the relevant statutory hook'" in both Acts. *Moncrieffe*, 133 S. Ct. at 1685.[2]

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[2] *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving

The categorical approach ensures that noncitizens convicted of the same offenses under state law "will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 133 S. Ct. at 1693 n.11 (citing *Taylor*, 495 U.S. at 599-602). This "policy favoring uniformity in the immigration context is rooted in the Constitution." *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (citing U.S. Const. art. I, § 8). By pegging immigration consequences to "convictions," Congress sought to avoid the "potential unfairness" of having "two noncitizens, each 'convicted of' the same offense, ... obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." *Moncrieffe*, 133 S. Ct. at 1690. Congress similarly "meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287-88.

The categorical approach's emphasis on predictability and fairness in the treatment of prior convictions has been a hallmark of immigration law for over a century. *See Moncrieffe*, 133 S. Ct. at 1685 (citing *United States ex rel. Mylius v. Uhl*, 210 F 860, 862 (2d Cir. 1914), and Alina Das, *The Immigration Penalties Of Criminal Convictions: Resurrecting Categorical Analysis In Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688-1702 (2011)). Strictly limiting the analysis to what noncitizens were "convicted of" has only become

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moral turpitude ... is deportable."); § 1229b(a)(3) (lawful permanent residents are ineligible for cancellation of removal if they have "been convicted of any aggravated felony").

more essential over time, as "changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

Today, a conviction for an "aggravated felony"—a category that now includes theft, obstruction of justice, and many nonviolent drug offenses, 8 U.S.C. § 1101(a)(43)—not only renders noncitizens deportable, § 1227(a)(2)(B)(iii), but also automatically disqualifies them from vital forms of discretionary relief: cancellation of removal, based on deep connections to their communities and extreme hardship that would befall their families, § 1229b(a)(3), (b)(1)(C); asylum, to avoid the risk of persecution abroad, § 1158(b)(2)(A)(ii), (B)(i); naturalization, §§ 1101(f)(8), 1427(a); relief under the Violence Against Women Act, §§ 1154(a)(1)(A)(iii)(II)(bb), 1229b(b)(2)(A)(iv); and adjustment of status for victims of trafficking, § 1255(*l*)(1)(b). Even misdemeanor crimes involving moral turpitude and low-level drug offenses can cause longtime residents to be torn from this country and their families without any recourse. *See* § 1182(a)(2)(i); § 1227(a)(2)(A)(ii), (B)(i); § 1229b(b)(1)(C), (d)(1)(B).[3]

In short, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who

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[3] Prior "conviction[s] for" certain felonies and misdemeanors will also substantially increase the maximum sentence that may be imposed under the INA's criminal illegal-reentry provision, from two years' imprisonment to ten or twenty. 8 U.S.C. § 1326(b)(1)-(2).

plead guilty to specified crimes." *Padilla*, 559 U.S. at 364 (footnote omitted). The need for "the categorical approach ... to promote efficiency, fairness, and predictability" in the treatment of prior convictions is therefore paramount. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

B. Because individuals are only "convicted of" those elements a jury must find, a uniform approach requires considering only the formal elements of an offense, not mere methods of committing one.

To ensure that the grave immigration consequences of prior convictions are meted out uniformly and predictably, the categorical approach treats a state conviction as a federal predicate offense "only if a conviction of the state offense '"*necessarily*" involved ... facts equating to the generic federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Shepard*, 544 U.S. at 24) (emphasis added; brackets omitted). The modified categorical approach can sometimes "help[] effectuate [this] categorical analysis," but only if the "*Shepard* documents" in the record shed light on what facts the conviction '"necessarily"' involved. *Descamps*, 133 S. Ct. at 2283; *see Shepard*, 544 U.S. at 26. So the question presented turns on what facts a conviction "necessarily" establishes: just the formal elements of the offense, or also other alleged facts regarding how the offense was committed, like the particular means employed.

Descamps already answered that question: "[T]he only facts the court can be sure the jury ... found are those constituting elements of the offense—as distinct

from amplifying but legally extraneous circumstances." 133 S. Ct. at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Id.* Whether reached by plea or verdict, all that a conviction "necessarily" establishes are the "elements" of the offense—those facts "a jury [must find] unanimously and beyond a reasonable doubt." *Id.*; *see also id.* at 2296, 2298 (Alito, J., dissenting) ("By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict .... The feature that distinguishes elements and means is the need for juror agreement, and therefore ... the critical question is whether a jury would have to agree on the [fact].") (citing *Richardson*, 526 U.S. at 817, and *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion)); *Matter of R–*, 2 I. & N. Dec. 819, 826 (BIA 1947) (a conviction establishes only "that which must be shown to establish ... guilt," because "[i]ssue was joined on th[e] charge, ... but nothing more").

Accordingly, a statute is "divisible," such that the modified categorical approach applies, only if its alternative phrases are a "list of alternative *elements*," one of which "[a] prosecutor ... must generally select" and "the jury ... must then find ... unanimously and beyond a reasonable doubt." *Descamps*, 133 S. Ct. at 2285, 2290 (emphasis added). If, instead, the statute merely lists different means of satisfying a single element—means that "[t]he jurors need not all agree

on"—the statute is "indivisible" and the modified categorical approach "has no role to play." *Id.* at 2285, 2290. Defendants are never "convicted" of a particular listed means, even if such a statutory phrase describes "what the defendant actually did." *Id.* at 2287

"Dismissing everything [this Court] said" regarding the "focus on the elements, rather than the facts, of a crime," *id.* at 2285-86, the Eighth Circuit held that any statute containing a "disjunctive list of [terms] ... is divisible," regardless of "[w]hether these amount to alternative elements or merely alternative means to fulfilling an element," J.A. 18-19.[4] But the Eighth Circuit "nowhere explains how a factfinder can have 'necessarily found' a non-element—that is, a fact that by definition is *not* necessary to support a conviction." *Descamps*, 133 S. Ct. at 2286 n.3. And there is no possible explanation. A jury cannot have "necessarily" found a mere means of commission that it did not have to agree upon; only formal elements fit the bill. Thus, the "mere use of the disjunctive 'or' in the definition of a crime does not automatically render it divisible." *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014); *see Almanza-Arenas v. Lynch*, 809 F.3d 515, 523 & n.11 (9th Cir. 2015) (en banc).

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[4] The Tenth Circuit similarly disregarded *Descamps*. *Compare United States v. Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) ("[T]he alternative statutory phrases may not be 'elements' in the full sense of the term as used in *Richardson* and *Schad*, but for the purposes of modified-categorical-approach analysis, that 'shortcoming' is generally irrelevant."), *with Descamps*, 133 S. Ct. at 2288 (expressly relying on *Richardson*'s definition of elements).

Ultimately, this Court meant what it said when it used the word "element" 85 times in *Descamps*: "All the modified approach adds is a mechanism for making [the categorical] comparison when a statute lists multiple, alternative *elements*, and so effectively creates '*several different ... crimes.*'" 133 S. Ct. at 2285 (emphasis added). A statute is only "divisible" if it can be divided into different *crimes*, and crimes are only different if they comprise distinct *elements*. This is how divisibility analysis has long worked in immigration law—the context in which the concept of "divisible" predicate offenses was developed decades ago. *Matter of P–*, 2 I. & N. Dec. 117, 118-19 (BIA 1944) ("Where, however, the statute is *divisible* or separable and so drawn as to include within its definition *crimes which do and some which do not* involve moral turpitude, the record of conviction ... may be examined.") (emphasis added). Because a statute does not create *several different* crimes if it merely lists alternative ways to commit a *single* crime, the modified categorical approach does not apply to statutes that list alternative means rather than elements.

C. Amici's cases highlight how the Eighth Circuit's approach contradicts *Descamps* and would yield grave, unpredictable results for noncitizens convicted of even minor offenses.

Amici's cases illustrate the significance of the distinction between alternative elements and means.

***Matter of Sama* (BIA; Attorney General).** Amicus Vera Sama has been a lawful permanent resident of the United States since 2002. In 2006, she

was convicted of theft, a violation of Maryland's Consolidated Theft Statute, Md. Code Ann., Crim. Law § 7-104. Her entire sentence was suspended and she served only probation. She later applied for naturalization, seeking to fulfill her dream of becoming a U.S. citizen, like her daughter. The Government instead launched removal proceedings against her because, in its view, her then-eight-year-old Maryland conviction constituted generic theft, and thus an aggravated felony. And because the Government charged her with being an aggravated felon, it placed her in mandatory immigration detention while she defended herself against removal. *See* 8 U.S.C. § 1226(c).

Generic theft requires taking (or exercising control over) another's property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership. *E.g.*, *Castillo v. Holder*, 776 F.3d 262, 267 (4th Cir. 2015). The Maryland "consolidated" provision, however, extends to two acts that do not qualify as generic theft: obtaining property *with* consent, such as "obtain[ing] control over property by ... deception," and theft of *services*. § 7-104(b), (e). Those portions of the statute appear in a disjunctive list with three other phrases that do correspond to generic theft. But the statute makes clear that a theft offense can be charged without specifying the means by which property or services were stolen (e.g., unauthorized taking versus deceit). § 7-108(a). And Maryland's highest court has confirmed that "Maryland's theft statute [does] not require ... jury unanimity" with respect to the "five ... alternate methods by which the crime of theft can be committed." *Rice v. State*, 532 A.2d 1357, 1358, 1361 (Md. 1987). Rather, "six jurors may think the defendant

guilty of violating [one phrase] and six guilty of violating [another phrase]," and the jury could still convict, because the statute creates just one, broad crime. *Id.* at 1361. Indeed, the Maryland Legislature's express purpose in enacting "the Consolidated Theft Statute was to avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law." *State v. Manion*, 112 A.3d 506, 514 (Md. 2015) (internal punctuation omitted).

Applying the Fourth Circuit's correct interpretation of *Descamps*, the BIA therefore held that "§ 7-104 is indivisible and the Immigration Judge is precluded from conducting a modified categorical inquiry." *In re Vera Sama*, 2015 WL 4761234, at *3 (BIA July 17, 2015). Because a conviction under the Maryland statute is not an aggravated felony, "the removal proceedings [were] terminated." *Id.* at *4. Sama was set to receive her green card back and focus on rebuilding her life after her time in immigration detention had caused her to lose her job and her home. In October, however, the Attorney General referred Sama's case to herself to address the precise question presented here. *Matters of Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (AG 2015). The matter is now likely being held pending disposition of this case.

If the Eighth Circuit's rule is adopted, the Attorney General will have to deconsolidate a statute that Maryland deliberately consolidated. Especially where, as in *Sama*, "state criminal statutes" have been "amended by state legislatures" for the purpose of making them broader than the generic offense (and thus easier for the State to obtain convictions under),

it would be "intrusive ... on the States" to ignore their prerogatives to define their own crimes. *Descamps*, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). Moreover, the Attorney General would then have to attempt to discern which statutory prong gave rise to Sama's conviction. She would rely upon whatever facts happen to be recited in the record of conviction, notwithstanding that no reason existed under state law to clarify or contest such details. That unpredictable inquiry could result in a lawful permanent resident of 14 years being deported because of alleged facts she was never "convicted" of.

***Gomez-Perez v. Lynch* (5th Cir.).** Amicus Hermenegildo Gomez-Perez has lived in the United States for over 20 years. He and his wife have three U.S.-citizen children. In 2000, he was convicted of misdemeanor assault in Texas following an altercation with his roommate. He served no time in prison. Gomez-Perez came to the attention of the authorities in 2011 following a traffic stop, and he was placed in removal proceedings. He applied for cancellation of removal, but the BIA found his then-15-year-old conviction was a crime involving moral turpitude that rendered him ineligible. *See* Add. 4a-6a. His petition for review is pending in the Fifth Circuit and raises the question presented here.

Under the INA, nonaggravated assault crimes do not entail moral turpitude unless they involve intentionally or knowingly causing bodily injury; recklessly causing bodily injury does not count. *Matter of Solon*, 24 I. & N. Dec. 239, 241-42 (BIA 2007). The Texas statute under which Gomez-Perez was convicted is

overbroad because it proscribes "intentionally, knowingly, or recklessly caus[ing] bodily injury." Tex. Penal Code § 22.01(a)(1). In the BIA's view, consistent with the Eighth Circuit's approach, the Texas statute is divisible because it contains the word "or," and thus application of the modified categorical approach was appropriate to determine whether Gomez-Perez's offense involved reckless conduct or not. Add. 4a-6a.

Texas law, however, is unequivocal that the terms are merely alternative means of satisfying a single mens rea element. "There is no indication that the legislature intended for an 'intentional' bodily injury assault to be a *separate crime* from a 'knowing' bodily injury assault or that both of those differ from a 'reckless' bodily injury assault." *Landrian v. State*, 268 S.W.3d 532, 537 & n.24 (Tex. Ct. Crim. App. 2008) (emphasis added) (citing *Schad*, 501 U.S. at 644). Rather, there is just a *single crime* of causing bodily injury "at least reckless[ly]." *Morales v. State*, 293 S.W.3d 901, 905 (Tex. App. 2009). Thus, "six members of a jury" could find intent, and six others could find recklessness, and the jury could still convict. *Landrian*, 268 S.W.3d at 537. Such disagreement is not unlikely, particularly with respect to nesting terms, like mental states, that involve nuanced gradations and are not mutually exclusive. *See id.* ("[P]roof of a greater culpability is also proof of any lesser culpability."). Under *Richardson*, the different mens rea levels are not elements, and so under *Descamps*, the statute is indivisible.

Consistent with *Descamps*, and contrary to the Eighth Circuit's rule, there can be no recourse to the modified categorical approach to try to infer from the

record of conviction what Gomez-Perez's mental state must have been. Texas prosecutors may choose to charge one or two mental states under § 22.01(a)(1) for simplicity's sake, *see, e.g.*, *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825-26 (5th Cir. 2012), or they may charge all three, as in Gomez-Perez's case. The happenstance of which alternative means are discussed in the *Shepard* documents cannot result in one noncitizen being deported, and another not, despite each being "convicted of" the same single offense. Such "differential treatment ... based on minor variations in the cases' ... documents" is just what *Descamps* forbids. 133 S. Ct. at 2288. Reaffirming *Descamps*'s formal-elements rule would ensure that Gomez-Perez's 16-year-old misdemeanor conviction would not deprive him of the opportunity merely to be considered for discretionary relief based on the exceptional and extremely unusual hardship his removal would cause his U.S.-citizen children. 8 U.S.C. § 1229b(b)(1).[5]

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[5] Precisely because the particular mens rea is not an element that had to be found, the record of conviction from Gomez-Perez's bench trial does not contain any finding regarding his specific mental state. So the modified categorical approach would offer little assistance in his case even if the statute were divisible. The BIA held, however, that this ambiguity under the modified categorical approach inured to Gomez-Perez's detriment because, as the applicant for cancellation of removal, he bore the burden of proving that he was *not* convicted of a predicate offense. Add. 6a, 13a. That holding was wrong as well; analyzing "what a conviction *necessarily* established" is a purely "legal question," *Mellouli*, 135 S. Ct. at 1987, which is unaffected by evidentiary burdens of proof. *See Moncrieffe*, 133 S. Ct. at 1685 n.4 ("Our analysis is the same in both [the cancellation and removal] contexts."). That

Other recent immigration cases similarly demonstrate that the Eighth Circuit's rule is incompatible with *Descamps* and would yield unfair and unpredictable results.

***Lopez-Valencia v. Lynch* (9th Cir.).** Roberto Lopez-Valencia, a lawful permanent resident since 1989, pleaded nolo contendere in 2004 to a California petty theft offense. Theft in California is broader than generic theft because the statute includes conduct like theft of labor, false credit reporting, and theft by false pretenses. Cal. Penal Code § 484(a). Applying the modified categorical approach, the BIA held his conviction involved conduct equating to generic theft and ordered Lopez-Valencia removed.

Relying on *Descamps*, the Ninth Circuit granted Lopez-Valencia's petition for review. 798 F.3d 863 (9th Cir. 2015). Although the various forms of theft are enumerated in a disjunctive statute, "[t]he California Supreme Court has spoken directly on juror unanimity under the theft statute, reasoning that

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question has divided the Courts of Appeals, however, and the Court need not address the effect of burdens of proof in this case. *Compare Thomas v. Att'y Gen.*, 625 F.3d 134, 147-48 (3d Cir. 2010) (ambiguous record of conviction means the conviction is not a predicate offense, even in context where noncitizen bears the burden of proof), *and Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008) (same), *and Berhe v. Gonzales*, 464 F.3d 74, 79, 85-86 (1st Cir. 2006) (same), *with Young v. Holder*, 697 F.3d 976, 979-80 (9th Cir. 2012) (en banc) (ambiguous record fails to satisfy noncitizen's burden), *and Salem v. Holder*, 647 F.3d 111, 115-16 (4th Cir. 2011) (same), *and Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009) (same).

while all jurors must agree that the defendant committed some form of unlawful taking, it is 'immaterial whether or not [the jury] agreed as to the technical pigeonhole into which the theft fell.'" *Id.* at 869-70 (quoting *People v. Nor Woods*, 233 P.2d 897, 898 (Cal. 1951)). Moreover, "the state legislature has gone a step further" by expressly providing that "'[i]n charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another,'" without specifying one or the other as an element. *Id.* at 869-70 (quoting Cal. Penal Code § 952). Because no jury would be required to "unanimously agree on the fact critical to the federal statute," the Ninth Circuit held that "the statute is overbroad and indivisible, ... the modified categorical approach 'has no role to play,'" and the court "should not go further to examine any of the documents contained in Lopez-Valencia's record of conviction." *Id.* at 868-70 (quoting *Descamps*, 133 S. Ct. at 2285).

That decision was correct and fully consistent with *Descamps*. Under the Eighth Circuit's approach, however, a lawful permanent resident for a quarter century would be deported merely on account of "the prosecution's theory of [the] case," not the actual "elements [he] was convicted of violating." *Id.* at 870.

***Omargharib v. Holder* (4th Cir.).** Sayed Gad Omargharib has been a lawful permanent resident since 1990. In 2011, he was convicted of grand larceny in Virginia, having walked off with "two pool cues valued in excess of $200 following a dispute with his opponent in a local pool league." 775 F.3d at 194. His 12-month sentence was suspended in full. The BIA nev-

ertheless held this was an aggravated felony theft offense, which subjected him to mandatory deportation. "Virginia law defines larceny in the disjunctive to include 'wrongful or fraudulent' takings," so the agency applied the modified categorical approach to determine "that Omargharib's larceny conviction rested on facts amounting to theft, not fraud." *Id.* at 195 (citing Va. Code Ann. § 18.2-95).

Applying *Descamps*, the Fourth Circuit granted his petition for review. "Virginia juries are not instructed to agree 'unanimously and beyond a reasonable doubt' on whether defendants charged with larceny took property 'wrongfully' or 'fraudulently.' Rather ... , it is enough for a larceny conviction that each juror agrees only that either a 'wrongful or fraudulent' taking occurred, without settling on which." *Id.* at 199. Because "wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements," the modified categorical approach could not apply, and the conviction categorically was not an aggravated felony. *Id.* at 200.

The Fourth Circuit was correct; Virginia's larceny statute does not "consist[] of 'multiple, alternative *elements*' creating 'several *different* crimes,' some of which would match the generic federal offense and others that would not," but rather "multiple alternative *means* (of committing the *same* crime)." *Id.* at 197-98 (quoting *Descamps*, 133 S. Ct. at 2284-85) (some emphases added). Yet, under the Eighth Circuit's approach, Omargharib and another noncitizen, "each 'convicted of th[is] same offense, might obtain different aggravated felony determinations depend-

ing on" what "non-elemental facts" the *Shepard* documents contain. *Moncrieffe*, 133 S. Ct. at 1690; *Descamps*, 133 S. Ct. at 2289.

***Rendon v. Holder* (9th Cir.).** Carlos Alberto Rendon has been a lawful permanent resident since 1989. He was convicted of second-degree burglary under Cal. Penal Code § 459. Although *Descamps* held that § 459 does not qualify as generic burglary. the BIA determined that the conviction qualified as an "attempted theft." As relevant, the California statute criminalizes "enter[ing] any ... vehicle ... , when the doors are locked, ... *with intent to commit grand or petit larceny or any felony*." Cal. Penal Code § 459 (emphasis added). The BIA thought the italicized phrase was divisible because it contains the word "or." Applying the modified categorical approach, "the BIA looked to the contents of petitioner's plea to determine that he had been convicted ... for 'entering a locked vehicle *with the intent to commit larceny*, an aggravated felony,'" and thus he was subject to mandatory deportation. 764 F.3d 1077, 1082 (9th Cir. 2014).

The Ninth Circuit granted Rendon's petition for review because "California state law is clear: the jury need not be unanimous regarding the particular offense the defendant intended to commit in order to convict under section 459. All the prosecution must prove is that the defendant intended to commit *an* offense listed in the statute—namely, 'grand or petit larceny or any felony....' Therefore, the substantive crimes are alternative *means* of satisfying the intent element of the statute, and the statute is indivisible." *Id.* at 1088-89 (footnote omitted); *see, e.g.*, *People v. Failla*, 414 P.2d 39, 45 (Cal. 1966) ("[I]n prosecutions

for burglary ... the jurors need not be instructed that to return a verdict of guilty they must all agree on the specific 'theory' of the entry—i.e., what particular felony or felonies the defendant intended at the time—provided they are told they must be unanimous in finding that a felonious entry took place."). The Eighth Circuit's approach would instead endorse the BIA's recourse to the plea colloquy, and Rendon would be subject to mandatory deportation on the basis of "superfluous factual allegations" regarding which felony he intended to commit (larceny versus another felony)—allegations that were "irrelevant to the proceedings" in California court. *Descamps*, 133 S. Ct. at 2289.

As each of these cases shows, the only way to ensure "efficiency, fairness, and predictability" in the treatment of prior convictions is to limit the inquiry to the only facts "a conviction *necessarily* establishe[s]": those elements that a jury must agree upon and find beyond a reasonable doubt. *Mellouli*, 135 S. Ct. at 1987; *see Descamps*, 133 S. Ct. at 2288.

II. Abandoning *Descamps*'s Formal-Elements Rule Would Cause Serious Practical Difficulties In Immigration Proceedings And Produce "Manifestly Unjust" Results.

Affirming the Eighth Circuit's approach would require repudiating *Descamps*'s holding that "the categorical approach's central feature" is "a focus on the elements ... of a crime," meaning those facts a jury must agree upon and "find ... beyond a reasonable doubt." 133 S. Ct. at 2285, 2288 (citing *Richardson*, 526 U.S. at 817). Such a retreat is unwarranted. Not

only would it raise serious Sixth Amendment concerns when applied to the INA's criminal provisions, *see supra* 7 n.3, Pet'r Br. 26-27, but also it would contravene a century's worth of immigration law deeming it "manifestly unjust ... to exclude one person and admit another where both were convicted of [the same offense]," based on what evidence is presented to immigration officials. *Mylius*, 210 F. at 863.

And because the Eighth Circuit's approach will lead to many more statutes being deemed divisible, adjudicators will have to examine conviction records in many more cases. That greater role for the modified categorical approach in cases like those described above would mean that the "severe 'penalty'" of deportation, *Padilla*, 559 U.S. at 365, will often hinge on "what evidence remains available" regarding facts that were not necessary to a conviction, "or how [the record] is perceived by an individual immigration judge" long after the fact, *Moncrieffe*, 133 S. Ct. at 1690. That is precisely the unfair and unpredictable result the categorical approach is meant to avoid.

A. Noncitizens, who are often unrepresented and detained, would face significant obstacles under an expanded modified categorical approach.

Under the Eighth Circuit's rule, the modified categorical approach would apply to *all* disjunctively phrased statutes, not just the subset of such statutes that actually define separate crimes by listing alternative elements. The result of this broader application of the modified categorical approach will be much more recourse to the *Shepard* documents under

circumstances where "[t]he meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Descamps*, 133 S. Ct. at 2289. Thus, the decision whether longtime residents with deep community and family ties may remain in the country would turn on what facts are merely alleged or discussed in *Shepard* documents, whether or not they are complete or correct.

Moreover, increased parsing of often-inscrutable conviction records will make the inquiry into the immigration consequences of prior crimes much more onerous and case specific. A more bogged-down inquiry will work especially to the detriment of noncitizens. When the modified categorical approach applies, noncitizens will often be required to demonstrate why the *Shepard* documents produced by the Government are inaccurate, inconclusive, or do not establish what the Government contends they do (e.g., because an indictment was later superseded or a plea was entered under *North Carolina v. Alford*, 400 U.S. 25 (1970), and thus does not admit the relevant facts). Yet 45 percent of noncitizens in removal proceedings are unrepresented.[6] The INA entitles noncitizens to representation in removal proceedings only "at no expense to the government," 8 U.S.C. §§ 1229a(b)(4)(A), 1362, and many cannot afford

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[6] U.S. Dep't of Justice, Exec. Office of Immigration Review, FY 2014 Statistics Yearbook, at F1, fig. 10 (2015) ("EOIR Yearbook"), *available at* http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

counsel on their own. Pro se noncitizens will particularly struggle with scrutinizing old conviction documents if they are among the 85 percent of noncitizens in removal proceedings who are not fluent in English.[7]

Adding to the difficulty, most noncitizens merely *charged* as removable because of prior convictions are subject to mandatory detention during removal proceedings, § 1226(c), in facilities that are indistinguishable from jail or prison. Mandatory detention is not limited to those with prior felonies; even noncitizens with misdemeanor drug or firearms convictions, or two misdemeanor crimes involving moral turpitude, must be detained. § 1226(c)(1)(B). As a result, in 2013, the Government detained over 440,000 noncitizens in removal proceedings.[8] And in 2014, 37 percent of all completed immigration cases involved detained noncitizens.[9] Those in detention are even less likely to be assisted by counsel; from 2007 to 2012, only 16 percent of detained noncitizens had lawyers. *See* Ingrid V Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015). Even those who do have counsel have difficulty communicating with their at-

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[7] *Id.* at E1, fig. 9.

[8] U.S. Dep't of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2013, at 5 (2014), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

[9] EOIR Yearbook at G1, fig. 11.

torneys. In 2010, 78 percent of detainees "were in facilities where lawyers were prohibited from scheduling private calls with clients."[10]

Expanded use of the modified categorical approach will take an especially heavy toll on those in detention, because they often lack copies of their own *Shepard* documents and thus must fly blind in defending against the Government's assertions regarding the nature of their convictions. The Government sometimes mails noncitizens copies of records. But noncitizens are regularly transferred among detention facilities anywhere in the country; in 2009, 52 percent of detainees were transferred at least once.[11] And the Government's detention standards do not provide for forwarding mail following transfers.[12]

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[10] Nat'l Immigrant Justice Ctr., Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court 4 (2010), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf.

[11] Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States, § 4 (2011), *available at* https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united.

[12] U.S. Immigration & Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards, §§ 5.1 (Correspondence and Other Mail), 7.4 (Detainee Transfers), *available at* https://www.ice.gov/detention-standards/2011.

Some noncitizens may seek to obtain their own copies of *Shepard* documents in order to verify or rebut the Government's assertions, for example, or show that the records produced by the Government are incomplete. But they are often stymied by the communication barriers in detention. In addition to the difficulty of receiving mail, they have very limited access to telephones, and generally no Internet access.[13] Even if noncitizens are able to locate the proper contact information for the state court in which they were convicted, requesting copies of records can be cumbersome and costly.[14] The Court has thus recognized that noncitizens in detention "have little ability to collect evidence." *Moncrieffe*, 133 S. Ct. at 1690.

B. The immigration system would become even more overburdened under the Eighth Circuit's less administrable rule.

The Court has also expressed concern about the practical implications of a fact-based approach for "our Nation's overburdened immigration courts,"

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[13] *Id.* § 5.6 (Telephone Access); *see* U.S. Gov't Accountability Office, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities, at 5 (2007), *available at* http://www.gao.gov/assets/270/263327.pdf; Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA 35-36 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

[14] *See, e.g.*, Policies and Procedures, Judicial Records Center, Rhode Island (2013) (requiring certified check or money order for $3 per offense as well as a letter with specific information about the conviction), *available at* https://www.courts.ri.gov/JudicialRecordsCenter/PDFs/PoliciesProcedure.pdf.

Moncrieffe, 133 S. Ct. at 1690, and the broader adjudicatory "system in which 'large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions,'" *Mellouli*, 135 S. Ct. at 1986-87 (quoting Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigration L. J. 257, 295 (2012)). Those burdens are significant. In 2015, 254 immigration judges had 457,106 cases pending, or 1,800 cases per judge.[15] By comparison, the average district court judge had 626 pending cases that year.[16] And while district judges may each be assisted by two or three law clerks, four immigration judges typically share a single clerk.[17] The caseload has led to a tremendous backlog in immigration court.[18]

The expanded modified categorical approach under the Eighth Circuit's rule would only add to this

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[15] Statement of Juan P. Osuna, Director of the Executive Office of Immigration Review, Before the House Committee on the Judiciary 1, 3 (Dec. 3, 2015) ("Osuna Statement"), *available at* http://judiciary.house.gov/_cache/files/467e5f9e-e9e9-4141-99be-5c24cac1db55/osunatestimony.pdf.

[16] Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (June 2015), *available at* http://www.uscourts.gov/file/18457/download.

[17] *Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 111th Cong. 56 (2010) (statement of Hon. Dana Marks).

[18] *See* EOIR Yearbook at A2 (163,042 more cases were opened than closed between 2010 and 2014).

burden. Although searching for the word "or" in a statute may be simple, what follows will be anything but: By expanding the inquiry beyond formal elements, the Eighth Circuit's approach will result in poring over *Shepard* documents in many more cases. Application of the modified categorical approach is already onerous enough for those agency adjudicators, who have no expertise in parsing the records of old state criminal proceedings. And the *Shepard* documents in the additional category of cases to which the modified categorical approach would apply—those involving mere alternative means in a disjunctive statute—will be especially difficult to dissect. Those documents are even more likely to be confusing or unclear precisely because, under state law, there will have been no need to carefully identify in an indictment or jury instructions which alternative means was at issue in the case. As a result, immigration adjudicators "would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 133 S. Ct. at 2289.

Three examples illustrate the difficulty. Amicus Gomez-Perez's charging document did not specify which mental state (intent, knowledge, or recklessness) he had, and the state court's judgment following a bench trial did not indicate which it was. *See* Add. 12a. That omission was no surprise, given Texas's clear position that the mental states are interchangeable and that one need not be specifically charged or found. *See supra* at 15. Yet the immigration judge and BIA spent considerable time examining the record of

conviction and considering whether the mental state could be inferred from the facts described in the complaint. Add. 11a-13a.

Similarly, in *Rendon*, the BIA examined Rendon's plea in an attempt to divine what felony he intended to commit once he entered a vehicle. 764 F.3d at 1082. But any indication he intended to commit larceny was a "superfluous factual allegation[]" that "was irrelevant to the proceedings" in the California court. *Descamps*, 133 S. Ct. at 2289. So the Ninth Circuit correctly recognized that the BIA should not have occupied itself with the *Shepard* documents at all.

And in *Olmsted v. Holder*, 588 F.3d 556 (8th Cir. 2009), the BIA pored over the noncitizen's plea transcript to determine whether his "hostile and belligerent" statements during a "drunken encounter with police" were made "with purpose to terrorize" the officers (which would be an aggravated felony crime of violence) or merely "in reckless disregard of the risk of causing such terror" (which would not). *Id.* at 558-60 (quoting Minn. Stat. § 609.713(1)). That hair-splitting analysis of intent should have been unnecessary; those two mental states can be charged disjunctively to a jury, which means that the jury need not agree on whether a defendant made threatening statements purposely or only recklessly. *See* 10 Minn. Prac., Jury Instruction Guides—Criminal § 13.106 (6th ed. 2015).

Beyond removal proceedings, greater application of the modified categorical approach would be even more challenging for the "front-line immigration officers" who also must consider whether noncitizens' convictions are disqualifying. *Mellouli*, 135 S. Ct. at

1987. Consular visa officials, Customs and Border Protection officers, Citizenship and Immigration Services adjudicators, and Immigration and Customs Enforcement agents all must evaluate noncitizens' convictions in the course of deciding whether to admit, naturalize, grant asylum to, or summarily remove noncitizens. 8 U.S.C. § 1158(a)(2), (d)(5)(A); § 1182(a)(2); § 1201(a)(1); § 1225(b)(1), (c)(1); § 1446(b). Those determinations are made by nonlawyers in nonadversarial proceedings. While an "immigration officer at the border" is capable of "check[ing] the alien's records for a conviction[,] [h]e would not call into session a piepowder court" to litigate what the prosecution's theory of the case was in the prior criminal proceeding, as the Eighth Circuit's approach would require. *Vartelas v. Holder*, 132 S. Ct. 1479, 1492 (2012).

Under *Descamps*'s elements-centric approach, in contrast, all these "'daunting' difficulties" can be avoided. 133 S. Ct. at 2289. Whether a given state criminal statute is divisible or corresponds to a generic offense is a purely legal determination that need only be made once, rather than by reference to the nuances of the *Shepard* documents in each case. Lists of which state statutes are disqualifying could then be provided to front-line adjudicators, as is already common practice. And, as *Descamps* correctly explained, there is "no real-world reason to worry" that "distinguishing between 'alternative elements' and 'alternative means' [will be] difficult," even the first time that determination must be made for a given state statute. *Id.* at 2285 n.2. As the examples above illustrate, state court decisions or other state authorities will often answer whether statutory terms are elements

that must be agreed upon by the jury and found beyond a reasonable doubt, or just methods of committing a single crime.

The text of the state statute standing alone may also make clear whether provisions are means or elements. In Sama and Lopez-Valencia's cases, for example, the statutes expressly provide that the particular means of committing theft need not be charged. Md. Code Ann., Crim. Law § 7-108(a); Cal. Penal Code § 952. In Petitioner and Rendon's cases, the use of a catchall term demonstrates that the terms that precede it are just illustrative examples. *See* Pet'r Br. 35-36. And where the statute provides different penalties for different alternatives, those alternatives will necessarily be elements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, Md. Code Ann., Crim. Law § 6-202 (providing a higher sentence for burglary with intent to commit a crime of violence than burglary with intent to commit theft); Tex. Penal Code § 22.01(b)-(c) (assigning different penalties for the various acts in subsection (a)(1)-(3)).[19]

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[19] As *Descamps* recognized, when courts have before them the individual's record of conviction, that record itself may sometimes be useful as one example of what state law treats as elements, because the documents may "reflect the crime's elements." *Descamps*, 133 S. Ct. at 2285 n.2. Of course, the documents in one particular case sometimes will not shed light on what terms are means versus elements under state law, because "prosecutors' charging documents do not always charge a defendant properly. In some instances, prosecutors may fail to 'select the relevant element[s] from its list of alternatives,' *Descamps*, 133 S. Ct. at 2290, or may include the specific means of committing the offense out of convenience" or to avoid juror confusion, and "defendants may plead to these imprecisely

Burdening immigration adjudicators with even more application of the modified categorical approach would only further compromise the fairness of process noncitizens receive from an overstretched system. Even now, as one immigration judge put it, serving on the immigration bench is "'[l]ike doing death-penalty cases in a traffic-court setting.'" *See* Eli Saslow, *In A Crowded Immigration Court, Seven Minutes To Decide A Family's Future*, Washington Post (Feb. 2, 2014). Rather than require immigration judges to "expend [additional] resources examining (often aged) documents," *Descamps*, 133 S. Ct. at 2289, the Court should adhere to *Descamps*'s limited, formal-elements-based modified categorical approach.

III. Abandoning *Descamps*'s Formal-Elements Rule Would Also Severely Burden State Criminal Proceedings, Given Defense Attorneys' *Padilla* Obligations.

Affirming the Eighth Circuit's approach would also create several problems for criminal defense lawyers representing noncitizens, for the state criminal

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charged indictments or informations without alteration." *Almanza-Arenas*, 809 F.3d at 524 n.13. Certainly, where a state court has definitively stated what facts are true elements that a jury must agree upon and find beyond a reasonable doubt, that binding pronouncement of state law would control the divisibility inquiry, regardless of how a given prosecutor may have charged the crime in a particular case. After all, *Descamps* did not purport to overrule this Court's earlier holdings that federal tribunals "are bound by [a state] Supreme Court's interpretation of state law, including its determination of the elements of [a criminal statute]." *Johnson*, 559 U.S. at 138; *see also Schad*, 501 U.S. at 636-37 (plurality opinion).

courts themselves, and for noncitizens who would be deprived of the benefits of their pleas—problems that *Descamps* expressly sought to avoid.

Under *Padilla*, "counsel must inform her client whether his plea carries a risk of deportation." 559 U.S. at 374. Indeed, a defense attorney has a constitutional obligation to conduct some inquiry into "adverse immigration consequences" facing his client even "[w]hen the law is not succinct and straightforward." *Padilla*, 559 U.S. at 369 & n.10. *Descamps*'s formal-elements rule facilitates this duty. Defense counsel will be aware of which particular facts in an indictment a jury would *necessarily* have to find in the pending criminal proceedings (e.g., causing bodily injury to another at least recklessly), as distinct from embellishing or superfluous facts that merely describe the manner in which the offense was committed (e.g., intentionally hitting one's rival in the head). And defense counsel can then readily compare the formal elements of the offense with the elements of deportable offenses under federal law

"The modified categorical approach complicates the negotiation process for prosecutors and criminal defense lawyers because it introduces additional variables they must consider in crafting a deal that minimizes the likelihood of downstream removal." *See* Stephen Lee, *De Facto Immigration Courts*, 101 Cal. L. Rev. 553, 605 (2013). If other "non-elemental facts" arising in indictments or plea colloquies may later be considered in removal proceedings, notwithstanding that those particulars are irrelevant in the state criminal proceedings, defense counsel will often be required to advise clients that they cannot be certain

whether a negotiated plea will succeed in avoiding deportation.

The result will be fewer pleas. *See id.* at 590. Because "deportation is ... sometimes the most important part ... of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes," *Padilla*, 559 U.S. at 364 (footnote omitted), noncitizens may prefer to take their chances at trial than plead to an offense that could result in deportation. *See* Ingrid V Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1195-1196 & n.315 (2013) (discussing anecdotal evidence that noncitizens facing a potential conviction with immigration consequences are more likely to go to trial). The predictability afforded by an elements-based categorical approach is essential to giving noncitizens sufficient comfort to accept pleas. "In particular, the approach enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (internal quotation marks and brackets omitted).

Defense counsel may also feel compelled to "contest facts that are not elements of the charged offense," such as a "prosecutor's statement" describing the criminal conduct, if the presence of those facts in the record of conviction could have downstream immigration consequences. *Descamps*, 133 S. Ct. at 2289. Yet, precisely because "squabbling about superfluous factual allegations" may "irk the prosecutor or court," *Descamps* emphasized that only actual elements of an

offense should be considered in the modified categorical analysis. *Id.* Similarly, if the Eighth Circuit's approach is adopted, immigration-minded defense counsel will be put in the untenable position of disputing alleged facts at trial that the jury need not find, even though such "extraneous facts and arguments may confuse the jury," or may be outright "prohibit[ed]" by the court. *Id.*, *see also Moncrieffe*, 133 S. Ct. at 1692 ("[T]here is no reason to believe that state courts will regularly or uniformly admit evidence going to facts ... that are irrelevant to the offense charged."). The Eighth Circuit's approach would thus impose the very burdens on state criminal proceedings that *Descamps* guards against.

Worse still, the Eighth Circuit's "approach will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 133 S. Ct. at 2289. Noncitizens who accept what they believe to be "'safe harbor' guilty pleas" to offenses with elements that do not correspond to a federal crime, *Mellouli*, 135 S. Ct. at 1987, may later be surprised to discover that "legally extraneous facts in the old record" will nevertheless cause their convictions to be treated as deportable offenses, *Descamps*, 133 S. Ct. at 2289. That "'unfair'" result should be avoided. *Id.*

In the end, *Descamps*'s reasoning was sound: Federal sentencing and immigration consequences should flow only from those facts that were *necessarily* contested and found in prior state proceedings—the formal elements of the offense. *Descamps* controls here and should be reaffirmed.

CONCLUSION

The Court should reject the Eighth Circuit's approach to divisibility and reaffirm *Descamps*'s holding that statutes are divisible, such that the modified categorical approach applies, only if they contain multiple alternative elements, one of which a jury must agree upon and find beyond a reasonable doubt.

Respectfully submitted,

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February 29, 2016

ADDENDUM A

Background on Organizational Amici

The **American Immigration Lawyers Association** (AILA) is a national organization of more than 14,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

The **Immigrant Defense Project** (IDP) is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v.*

Holder, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief).

The **National Immigration Project of the National Lawyers Guild** (NIPNLG) is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For thirty years, the NIPNLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises. The NIPNLG has participated as amicus curiae in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli*, 135 S. Ct. 1980, *Vartelas*, 132 S. Ct. 1479; *Carachuri-Rosendo*, 560 U.S. 563; *Padilla*, 559 U.S. 356.

ADDENDUM B

U.S. Department of Justice
Executive Office for Imigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia
20530

File: A200 958 511–San Antonio, TX

Date: Mar-3 2015

In re:
HERMENEGILDO GOMEZ-PEREZ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION:
Reconsideration

In a final administrative order dated October 21, 2014, this Board dismissed the respondent's appeal from an Immigration Judge's February 21, 2013, re-

moval order. The respondent now moves for reconsideration pursuant to section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6), alleging that the Immigration Judge and the Board erroneously found him ineligible for cancellation of removal. The motion will be denied.

The respondent is a native and citizen of Guatemala who concedes that he is removable by virtue of his unlawful presence in the United States. To qualify for cancellation of removal, the respondent must demonstrate that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)," among other things. In our decision of October 21, 2014, we concluded that the respondent has not carried his burden of proof in that regard because he is unable to establish that his 2000 Texas conviction for "assault family violence" is not for a disqualifying crime involving moral turpitude ("CIMT") under sections 212(a)(2)(A)(i)(I) and 237(a)(2)(A)(i) of the Act. To be precise, we concluded that the criminal statute under which the respondent was convicted—Tex. Penal Code § 22.01(a)(1)—is "divisible" vis-à-vis the CIMT concept and that the record of his conviction is "inconclusive" because it does not reveal whether he committed his offense knowingly or intentionally (in which case it would be a CIMT) as opposed to recklessly (in which case it would not be a CIMT).

In his motion to reconsider, the respondent maintains that our prior decision was erroneous in two respects. First, he asserts that Tex. Penal Code § 22.01(a)(1) is not "divisible" at all within the meaning of *Descamps v. United States*, 133 S. Ct. 2276 (2013), because the alternative mental states with

which that offense can be committed (i.e., intent, knowledge, and recklessness) do not define alternative offense "elements," but rather mere alternative "means" by which the statute's mens rea element can be satisfied. Second, and in the alternative, he claims that even if Tex. Penal Code § 22.01(a)(1) is divisible, we erred when we held that the inconclusiveness of the conviction record disqualifies him from relief. We will address each argument in turn.

While we understand the respondent's "elements-versus-means" argument, the divisibility of Tex. Penal Code § 22.01(a)(1) is ultimately a question of circuit law. *See Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014). The United States Court of Appeals for the Fifth Circuit (in whose jurisdiction this case arises) has held in its post-*Descamps* CIMT cases that a statute is divisible, so as to warrant a modified categorical inquiry, whenever it "has multiple subsections or an element phrased in the disjunctive, such that some violations of the statute would involve moral turpitude and others not." *See Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1059 (5th Cir. 2014) (citations omitted). The Fifth Circuit has not interpreted *Descamps* to require a focus upon the distinction between "elements" and "means" when evaluating a statute's divisibility. *See also United States v. Trent*, 767 F.3d 1046, 1058-61 (10th Cir. 2014). Applying the Fifth Circuit's conception of divisibility in this case, as we must, we conclude that Tex. Penal Code § 22.01(a)(1) is a divisible statute vis-à-vis the CIMT concept because its mens rea element is phrased in the disjunctive and defines some offenses that are morally turpitudinous and others that are

not. Accordingly, with respect to the divisibility question, we discern no legal error in our prior decision that would warrant reconsideration.

We also find no legal or factual error in our prior decision as it relates to the effect of an "inconclusive" conviction record upon the respondent's eligibility for cancellation of removal. As the Fifth Circuit has recognized, in cancellation of removal cases the burden is on the applicant to demonstrate that his criminal convictions do not bar relief; the burden is not on the DHS to establish his ineligibility. *See Vasquez-Martinez v. Holder*, 564 F.3d 712, 715-16 (5th Cir. 2009). As the party with the burden of persuasion, the respondent necessarily bears the risk of uncertainty when important facts remain in doubt. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Thus, most courts to have addressed the question—including the Fifth Circuit, in a non-precedential opinion—have held that an applicant for cancellation of removal who has a criminal record cannot carry his burden of proving the absence of a disqualifying conviction merely by presenting an "inconclusive" record. *See Francis v. Holder*, 556 Fed. Appx. 343 (5th Cir. 2014); *see also Syblis v. Atty. Gen. of U.S.*, 763 F.3d 348, 356-57 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712, 720 n. 6 (7th Cir. 2014); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009).

We realize that the Ninth Circuit recently reversed course on this question, holding that an inconclusive conviction record is sufficient to establish eligibility for cancellation of removal. *Almanza-Are-*

nas v. Holder, 771 F.3d 1184 (9th Cir. 2014), *abrogating in part, Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012) (en banc). We decline to follow that decision in Fifth Circuit cases, however; indeed, we note that *Almanza-Arenas* is currently the subject of a petition for panel rehearing in the Ninth Circuit and has been made the subject of a sua sponte en banc call. Under the circumstances, we will reaffirm our prior determination that the respondent—having been convicted under a divisible statute—is ineligible for cancellation of removal because his conviction record is inconclusive with respect to the mental state with which the offense was committed.

The following order will be entered.

ORDER: The motion to reconsider is denied.

/s/ Roger A. Pauley
FOR THE BOARD

ADDENDUM C

U.S. Department of Justice

Executive Office for Immigration Review

FallsChurch, Virginia 20530

Decision of the Board of Immigration Appeals

File: A200 958 511—San Antonio, TX

Date: **Oct-21 2014**

In re: HERMENEGILDOGOMEZ-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stephen O'Connor, Esquire

ON BEHALF OF DHS: Eric C. Bales

Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]—Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Guatemala, appeals from an Immigration Judge's February 21, 2013, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The respondent concedes removability (Tr. at 3), and thus the sole issue on appeal is whether the respondent has carried his burden of proving that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)" that bars him from applying for cancellation of removal. Section 240A(b)(1)(C) of the Act.

It is undisputed that the respondent sustained a 2000 Texas conviction for "assault family violence," an offense which was designated a "class A misdemeanor" by the sentencing court (Exh. 3, tab E, pp. 101 124). Although the respondent's conviction record does not specifically identify the section of the Texas Code under which he was convicted, the Immigration Judge properly found that the language of the charging document was consistent only with a conviction under section 22.01(a)(1) of the Texas Penal Code (I.J. at 4; Exh. 3, tab E, p. 101). The respondent maintains on appeal that he might have been convicted under paragraphs (2) or (3) of section 22.01(a) and that the Immigration Judge erred by failing to consider those possibilities, but we discern no error in the Immigration Judge's determination

that the respondent was in fact convicted under paragraph (1). As noted, the respondent's offense was denominated a "class A misdemeanor," a designation that is consistent *only* with a violation of section 22.01(a)(1); violations of sections 22.01(a)(2) and (a)(3) were designated "class C misdemeanors," except in instances—not applicable here—where the victim was proven to be elderly or disabled. *See* Tex. Penal Code §§ 22.01(b), (c) (1998).

Having concluded that the respondent was convicted under Tex. Penal Code § 22.01(a)(1), the Immigration Judge found him ineligible for cancellation of removal on the ground that his offense of conviction was a crime involving moral turpitude ("CIMT") within the meaning of sections 212(a)(2)(A)(i)(I) and section 237(a)(2)(A)(i) of the Act (I.J. at 3-4). The respondent disputes that determination on appeal.

To determine whether the respondent has a CIMT conviction, we employ the methodology adopted by the Attorney General in *Matter of Silva-Trevino*, 24 I&N Dec. 687, 688-89, 696 (A.G. 2008), to the fullest extent possible. *See* 8 C.F.R. § 1003.1(g). Under *Silva-Trevino*, the first step of the CIMT analysis involves a "categorical" inquiry, in which the statute defining the offense of conviction is examined to ascertain whether moral turpitude inheres in all offenses that have a "realistic probability" of being successfully prosecuted thereunder. *Id.* at 689-90, 696-98. If this categorical inquiry reveals that the statute of conviction is sometimes used to prosecute non-turpitudinous conduct, then *Silva-Trevino* requires the Immigration Judge to conduct a second-step inquiry in which specific documents comprising the alien's

record of conviction are examined in order to discern the nature of the underlying offense of conviction. *Id.* at 690, 698-99.[1]

At all relevant times, Tex. Penal Code § 22.01(a)(1) has provided that "[a] person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." This language does not define a categorical CIMT because it covers the *reckless* infliction of bodily injury. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996) (holding that third-degree assault under Hawaii law, which involves recklessly causing bodily injury. is not a CIMT).

As a realistic probability exists that section 22.01(a)(1) would be applied to prosecute non-turpitudinous conduct, it was permissible for the Immigration Judge to examine the respondent's conviction record in order to ascertain the nature of the respondent's particular offense of conviction. Conducting such an inquiry, the Immigration Judge noted that the respondent was charged with "intentionally, knowingly, and recklessly" causing

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[1] The Attorney General also held that if consideration of the record of conviction does not conclusively resolve the moral turpitude issue, evidence *beyond* the record of conviction may be considered by an Immigration Judge to determine whether a particular crime involved moral turpitude. *Matter of Silva-Trevino, supra*, at 690, 699-701. This aspect of *Silva-Trevino—the* so-called "third step" inquiry into evidence beyond the record of conviction—was not applied by the Immigration Judge and will not be applied on appeal because it has been rejected as impermissible by the United States Court of Appeals for the Fifth Circuit. *See Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014).

bodily injury to his victim by "hitting [him] on and about the head" with his hand (I.J. at 3, 4; Exh. 3, tab E, p. 101). Based on that description of the offense, the Immigration Judge concluded that the respondent had committed an *intentional* violent assault against a member of his household (i.e., his roommate).

As a rule, the intentional infliction of bodily injury upon another is morally turpitudinous conduct, without regard to the existence of a "domestic" relationship between the offender and the victim. *See Matter of Solon*, 24 I&N Dec. 239 (BIA 2007). The respondent contends on appeal, however, that the Immigration Judge erred by deeming him to have been convicted of committing an *intentional* assault, and we are inclined to agree with the respondent in that regard. The respondent's conviction record reflects that he pled "not guilty" to the foregoing charge (Exh. 3, tab E, at p. 120); and while the trial court found him guilty after a bench trial, the court's judgment does not contain any findings of fact or statement of reasons specifying exactly which charged elements or facts the judge found to be true beyond a reasonable doubt. As the respondent explains in his brief, when a Texas prosecutor alleges criminal mental states in the conjunctive (i.e., "intentionally, knowingly, *and* recklessly"), the factfinder may render a guilty verdict if he or she finds that the defendant acted with *any* of the enumerated mental states, including the least culpable of them (in this case, recklessness). *See Perez v. State*, 704 S.W.2d 499, 501 (Tex. Ct. App. 1986). Thus, in our view the record does not conclusively establish which mental state the respondent was convicted of possessing when he inflicted bodily injury upon his victim; he may have

been convicted of an intentional (turpitudinous) assault or a reckless (non-turpitudinous) one.

The inconclusiveness of the conviction record does not aid the respondent, however, because as an applicant for cancellation of removal he bears the burden of proving the *absence* of a disqualifying conviction. An inconclusive record is insufficient to carry that burden. *See Francis v. Holder*, 556 Fed. Appx. 343 (5th Cir. 2014); *Matter of Almanza*, 24 I&N Dec. 771, 774-75 (BIA 2009); *see also Syblis v. Atty. Gen. of U.S.*, 763 F.3d 348, 356-57 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712, 720 n. 6 (7th Cir. 2014); *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009). Inasmuch as the respondent has not established the absence of a disqualifying CIMT conviction, his application for cancellation of removal was properly denied.

In conclusion, the respondent is removable based on his unlawful presence and ineligible for cancellation of removal by virtue of his 2000 Texas conviction for assault family violence. The Immigration Judge granted the respondent the privilege of voluntary departure, however, and the respondent has provided us with timely proof that he posted the mandatory voluntary departure bond with the DHS. Accordingly, we will reinstate voluntary departure.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with

conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to

this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

s/Roger A. Pauley
FOR THE BOARD

No. 15-6092

In The

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Immigration Reform Law Institute ("IRLI"), is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

While *Amicus Curiae* agrees with the points raised by the United States, *Amicus Curiae* submits this brief to lend its immigration-related expertise to the Court. This brief focuses on the use of the categorical and modified categorical approaches in the immigration context.

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[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amicus Curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), Petitioner Mathis and the United States received timely notice of, and consented to, *Amicus Curiae*'s filing of this brief. Their consent letters have been filed with this brief.

SUMMARY OF THE ARGUMENT

Immigration law has used the categorical and modified categorical approaches to determine if a certain conviction carries a penalty of deportation. An "elements versus means" distinction is not supported in the immigration context. Because of the unique nature and characteristics of crimes that carry a deportation penalty, the categorical and modified categorical approaches must be more flexible than the traditional criminal application. Additionally, the history and application of the categorical and modified categorical approaches by the Supreme Court do not support a distinction.

Not only is a distinction not supported by precedence, it is also not supported in the practical application of the approaches. If the Court were to adopt an arbitrary differentiation between elements and means, many state statutes would no longer carry deportation as a consequence for aliens convicted of felonies. This result is contrary to Congressional intent. Finally, a distinction would complicate the duty defense attorneys have in advising alien clients of the immigration consequences a guilty conviction may have upon their immigration status.

ARGUMENT

I. The Genesis of the Categorical and Modified Categorical Approaches.

The modern categorical and modified categorical approaches were adopted by this Court in *Taylor v. United States*, 495 U.S. 575 (1990). In *Taylor*, the Court was called upon to determine if a defendant's three prior convictions, including two burglary convictions, could be used to enhance his current sentence under 18 U.S.C. § 924(e)(2)(B)(ii). *Id.* at 576-78. Section 924(e)(2)(B)(ii) allows for sentencing enhancement when the defendant's conviction resulted from "burglary, arson, or otherwise involves conduct that presents a serious potential risk to physical injury to another;. "

In applying section 924(e)(2)(B)(ii), the Court was faced with a dilemma:

> On the face of the federal enhancement provision, it is not readily apparent whether Congress intended "burglary" to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement. And if Congress intended that a uniform definition of burglary be applied, was that definition to be the traditional common-law definition, or one of the broader "generic" definitions articulated in the Model Penal Code and in a predecessor statute to § 924(e),

> or some other definition specifically tailored to the purposes of the enhancement statute?

Id. at 579. To help resolve this dilemma, the Court examined the legislative history of section 924(e). *Id.* at 581-90. From that history, the Court expressed two observations: (1) In amending the sentence enhancing statute in 1986, Congress did not intend "to replace the 1984 'generic' definition of burglary with something entirely different," despite neglecting to include a definition of the crime of burglary as before, and (2) Congress did not abandon its "general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law." *Id.* at 590.

From these observations, the Court narrowed the range of possible meanings of the term "burglary." The Court rejected the appellate court's approach that relied on the label of the crime employed by the state criminal code. The Court also rejected the common law definition of the term as "the contemporary understanding of 'burglary' has diverged a long way from its common-law roots," "the arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns," and "construing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within

the common-law definition." *Id.* at 593, 594. The Court concluded that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," that is, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

The Court then elucidated the analytical framework by which sentencing courts are to determine whether the underlying conviction fits the generic crime. "[I]f the state statute is narrower than the generic view" or "where the generic definition has been adopted, with minor variations in terminology," the trial court should use the categorical approach. *Id.* at 599. Under the categorical approach, courts are to "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. If a statute includes conduct broader than that of the generic definition, the trial court should use the modified categorical approach. *Id.* at 601. Under the modified categorical approach, courts can examine conviction documents to determine whether the conduct corresponded to the generic crime or fell outside of it. *Id.* at 601-02.

II. The Application of the Categorical and Modified Categorical Approaches to Immigration Law Is Better Supported by Affirming the Decision Below.

Following *Taylor*, courts began applying the categorical and modified categorical approaches to

immigration law. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (noting a court must examine the conviction itself, not what might have or could have been charged); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) (finding that "aiding and abetting" fell within the generic crime of theft). As in the criminal context, "[t]he 'categorical' approach looks at solely the structure of the statute that is the subject of the conviction, and not the 'underlying circumstances' (what the person actually did)." IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 255 (14TH ED. 2014). If a statute is divisible, where some alternatives list removal grounds and others do not, a court may examine the *Shepard* documents to determine if the conviction was a deportable offense. *See id.*; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005) (allowing charging documents, plea agreement, transcript of a colloquy, or some comparable judicial record to be considered when applying the modified categorical approach).

Courts use these approaches to determine if the underlying conviction fits within a category of an offense that carries immigration consequences. These categories include crimes involving moral turpitude ("CIMT"), crimes of violence, offenses related to controlled substances, and aggravated felonies. An alien who is convicted of a crime in one of these categories is deportable. *See, e.g.*, 8 U.S.C. § 1227(a)(2) (CIMT provision); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony provision); *see also, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (applying the

categorical approach to determine if the alien's conviction under 18 U.S.C. § 841 qualified as an aggravated felony).

In criminal practice, the analysis of an underlying conviction stops with the modified categorical approach even if a court cannot discern if the conviction can be used to enhance a defendant's sentence. In the immigration context however, a third analytical framework was needed for assessment of some aggravated felonies. *See Nijhawan v. United States*, 557 U.S. 29 (2009) (recognizing the unique requirements of some subsections of the aggravated felony statute); *see also* 8 U.S.C. § 1101(a)(43)(M) (requiring that an offense "involves fraud or deceit" to qualify as an aggravated felony). Thus, the "specific circumstance approach" was created. This approach requires a court to consider the specific circumstances under which the crime was committed. *Nijhawan*, 557 U.S. at 38. Specifically, an immigration judge may use other documents such as "earlier sentencing-related materials" when determining if a conviction meets certain aggravated felony subsections. *Id.* at 42. Otherwise, certain aggravated felony provisions would be left with little to no meaningful application. *Id.* at 39.

Likewise, a unique analytical framework was needed for assessment of CIMT cases to stem confusion and disparity in immigration adjudications. This is so because moral turpitude is not defined by the Immigration and Naturalization Act ("INA") and is traditionally not an element of conviction. *Matter of*

Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008), *vacated*, 26 I. & N. Dec. 550 (A.G. 2015) (recognizing the unique characteristics of the CIMT provision).[2] The Attorney General therefore announced in *Matter of Silva-Trevino* a specialized method for analyzing CIMTs that not only differed from the criminal use of the categorical and modified categorical approaches but also differed from how aggravated felonies are analyzed:

> [A]djudicators should: (1) look first to the statute of conviction under the categorical inquiry ; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines necessary or appropriate to resolve accurately the moral turpitude question.

Id. at 704. However, even this framework has been met with challenges in its application of the categorical and modified categorical approaches. *Matter of*

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[2] Moral turpitude has been described by the courts as "inherently base, vile, or depraved and contrary to the accepted rules of morality and in the duties owed between persons or to society in general." *Matter of Oretega-Lopez*, 26 I. & N. Dec. 99, 100 (B.I.A. 2015) (finding animal fighting constitutes a CIMT) (citation omitted).

Silva-Trevino, 26 I. & N. Dec. 550, 552 (A.G. 2015) (vacating the framework because of a circuit split which developed).

The characteristics of divisibility are still an open ended issue in the immigration field. *Compare Matter of Landerman*, 25 I. & N. Dec. 721 (B.I.A. 2012) ("[T]he categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena[ ]. "), *with Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478 (B.I.A. 2015) (requiring the same application of the criminal field's use of the categorical and modified categorical approaches in the immigration field).[3] However, the analyses of both aggravated felonies and CIMTs demonstrate that the use of the categorical and modified categorical approaches in the immigration law context do not exactly track their uses in criminal law as applied in *Taylor* and later in *Descamps v. United States*, 133 S. Ct. 2276 (2013). *See also* ALINA DAS, *THE IMMIGRATION PENALTIES OF CRIMINAL CONVICTIONS: RESURRECTING CATEGORICAL ANALYSIS IN IMMIGRATION LAW*, 86 N.Y.U. L. REV. 1669, 1719 (2011) ("The Supreme Court's statement in *Nijhawan* – that there is 'nothing in prior law that so limits the immigration court' to the categorical analysis – is particularly telling.

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[3] *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478 (B.I.A. 2015) has been stayed by the Attorney General for her to determine how the term "divisibility" is defined for immigration purposes. *See Matter of Chairez-Castrejon and Sama*, 26 I. & N. Dec. 686 (A.G. 2015).

None of the recent decisions account for the basis for the categorical analysis in immigration law.") (citation omitted).

Both CIMTs and aggravated felonies may contain alternatives that, regardless of whether a distinction is made, are neither elements nor means. For instance, certain aggravated felony subsections require a circumstance-specific analysis. *See* 8 U.S.C. § 1101(a)(43)(K), (M), and (P) (These aggravated felony subsections have been identified as possessing unique requirements, such as monetary thresholds or requiring fraud or deceit, that necessitate an analysis under the circumstance-specific approach). And CIMTs do not have a generic crime to which elements or means can be matched and analyzed; an adjudicator must simply judge and justify if a conviction is a CIMT. *See, e.g.*, *Matter of Louissaint*, 24 I. & N. Dec. 574 (B.I.A. 2009) (applying *Matter of Silva-Trevino* and the categorical method to determine that under a Florida burglary statute, burglary was a CIMT).

Affirming the Eighth Circuit's decision in the instant case would better account for the significant differences between immigration and criminal law. Without an elements and means distinction, the analyses of aggravated felonies and CIMTs would be simplified. Courts would not have to laboriously parse through common alternatives in state and federal statutes such as different *mens rea*, different weapons used to execute a crime, or different locations of where the crime took place. Instead, the presence of alternatives, as long as some language within the

statute qualified as a deportable offense, would trigger the modified categorical approach.

Affirming the lower court would also add needed flexibility to how statutes are analyzed in the immigration context as federal and state criminal statutes do not fit neatly within the INA's aggravated felony and CIMT provisions. For instance, a society's perception of a crime can change whether a conviction is a CIMT or how a generic crime is defined. *See Matter of Ortega-Lopez*, 26 I. & N. Dec. at 100 n.2. ("This case illustrates the difficulty in applying a narrow, static definition because of the evolving nature of what conduct society considers to be contrary to accepted rules of morality as reflected in criminal statutes."). To accommodate these various analyses, which may be required in the immigration context, the lower court's decision should be affirmed.

III. A Superficial Differentiation Between Elements and Means Would Disqualify Several State Statutes Where The Statutory Language Would Otherwise Meet The Generic Definition of Burglary.

Each state has independently defined what qualifies as burglary within their specific jurisdiction. While states may choose to codify burglary in degrees based upon circumstances, each burglary statute

requires unauthorized entry into a specific location.[4] Defining the specific location has taken three different forms. First, a very limited number of states use the generic language of building, structure, or dwelling without also defining these terms within the state's code. *See, e.g.*, ALASKA STAT. § 11.46.310 (using the term "building" in the second degree burglary statute without further defining the term's meaning). The second statutory pattern is to list multiple locations within the burglary statute's text; some of which are included in the generic burglary definition and some of which are broader. *See, e.g.*, GA. CODE ANN. § 16-7-1 (listing "an occupied, unoccupied, or vacant building, structure, vehicle, railroad car, watercraft, or aircraft" as possible locations where a second degree burglary may take place). Finally, in the most common pattern, a state may use a generic term such as building or structure in the burglary statute, but then define that term or terms elsewhere in the code. *See, e.g.*, N.J. STAT. ANN. § 2C:18-1 (2016); N.J. STAT. ANN. § 2C:18-2 (using the term "structure" in the burglary statute and then separately defining "structure" as a building, room, ship, vessel, car, vehicle, or airplane. ").

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[4] *Amicus Curiae* reviewed each state's burglary statutory scheme to analyze the text. Maryland's definition is an outlier to the three forms a definition may take. Maryland's definition of a "dwelling" in the burglary statute "retains a judicially determined meaning. " MD. CRIM. LAW CODE. ANN. § 6-201.

The majority of state statutes include a specific location requirement, either within the statute or by reference to another section in the code. The most common statutory formulation is the third, where a generic term is used in the burglary statute while the generic term is defined elsewhere. Only six states have chosen to use generic language without including any additional locations within the statute itself or defining the generic term in another portion of its code.[5]

If a superficial distinction between elements and means was found, it would have a profound impact for most current state burglary statutes, as they would no longer qualify as an aggravated felony merely because the language does not mirror the generic definition.[6] In almost every state, at least one current burglary statute would no longer qualify, since the modified categorical approach could no longer be used to determine whether the state conviction was encompassed in the federal generic definition.

Narrowing the application of the aggravated felony statute is contrary to the legislative history of

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[5] These states are Alaska, Colorado, Massachusetts, North Carolina, Pennsylvania, and Texas.

[6] In addition to meeting the requirements of the generic crime, an aggravated felony conviction for burglary also requires a sentence of at least one year. 8 U.S.C. § 1101(a)(43)(G). *Amicus Curiae* considered only the statutory text, not the sentencing requirement.

the section and the current goals set out by Congress. The aggravated felony was introduced in the ANTI-DRUG ABUSE ACT OF 1988. It made murder, drug trafficking, illicit trafficking of firearms or destructive devices and conspiracy deportable offenses. ANTI-DRUG ABUSE ACT OF 1988, PUB. L. NO. 100-690, 102 STAT. 4181, 4469 (1988). From its original language, the aggravated felony statute has grown to include more crimes, require deportation for a conviction of an aggravated felony, and clarify statutory language to allow for easier application. *See* IMMIGRATION ACT OF 1990, PUB. L. NO. 101-649, 104 STAT. 4978; ILLEGAL IMMIGRATION REFORM AND IMMIGRATION RESPONSIBILITY ACT OF 1996, PUB. L. NO. 104-208, 110 STAT. 3009.

Over time, Congress has progressively expanded its view of the function of the aggravated felony classification, and its applicability to different crimes and convictions. Creating an "elements versus means" distinction would greatly limit the reach of the aggravated felony provision, which is contrary to the will of Congress. The aggravated felony of burglary is just one example of how almost every state would be affected by this unsupported distinction. Creating a distinction between elements and means would leave the immigration courts unable to use *Shepard* documents to determine whether the conviction fell within the generic definition, and thus arbitrarily block the removal of convicted felons from the United States. Moreover, applying this distinction would surely have a similar debilitating effect on

other generic crime subsections of the aggravated felony provision in the INA. *See* 8 U.S.C. § 1101(a)(43).

IV. Supreme Court Precedent Prior to and in *Descamps* Do Not Distinguish Between Elements and Means, and Support Use of the Modified Categorical Approach When Alternatives Are Present in a State or Federal Statute.

Petitioner focuses on footnote 2 of *Descamps* to suggest that the Court requires a distinction between elements and means. Petitioner's argument fails for two reasons. First, *Taylor* itself, upon which *Descamps* relied, did not distinguish between elements and means. *See* 495 U.S. at 602. In *Taylor*, this Court specifically recognized that where alternatives are present in a statute, some may comport with the generic crime while others may not. *Id.* (recognizing that a State's burglary statute may include entry into a building as well as an automobile). To properly analyze a conviction, a court may review additional information in applying the modified categorical approach.[7]

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[7] In *Shepard*, the Court clarified in the criminal context which documents may be reviewed to complete a modified categorical approach analysis. 544 U.S. at 17 (allowing review of limited documents from the trial to determine whether a statute with "a broader definition of burglary" fulfilled the generic definition).

Second, other findings within the text of the *Descamps* opinion support the Government's approach and allow the majority of state burglary statutes to survive categorical approach review. In *Descamps* this Court gave the following example of a divisible statute as guidance:

> That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offence, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction.

Descamps, 133 S. Ct. at 2281. The example makes clear that the presence of alternatives in a statute, some of which fit within the generic offense and some outside of it, require a court to apply the modified categorical approach. *See id.* at 2285. Footnote 2 merely clarifies this position by declining to draw an artificial distinction between elements and means for the application of the modified categorical approach. *See id.*

While Petitioner may find footnote 2 of *Descamps* instructive, *Amicus Curiae* finds the history of the modified categorical approach and the examples given by the Court itself more relevant. The Supreme Court has never created a distinction between elements and

means. To do so now would needlessly deviate from established precedent and inject added confusion as to the correct application of the categorical and modified categorical approaches.

V. Staying True to Current Precedent Will Enable Defense Counsel to Give Their Alien Clients Accurate Information Regarding Possible Deportation Consequences as Required Under *Padilla*.

To effectively represent an alien client in a criminal case, an attorney must advise the client of the potential for deportation. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (requiring defense counsel to properly advise alien clients of the potential immigration consequences of a guilty plea). The "norms" of the profession require attorneys to alert their client of any negative immigration effects of a guilty plea. *Id.* at 372. As Padilla observed, the number of offenses for which deportation is a consequence has grown over time. *Id.* at 360. Even with the increased complexity of relevant offenses and statutory nuances, defense attorneys are still expected to provide "advice about deportation." *Id.* at 371.

Because of the ethical obligation placed on attorneys, competency in applying the categorical approach has become a "prerequisite" for defense counsel representing aliens in criminal proceedings. JENNIFER LEE KOH, *THE WHOLE BETTER THAN THE SUM: A CASE FOR THE CATEGORICAL APPROACH TO DETERMINING THE IMMIGRATION CONSEQUENCES OF*

CRIME, 26 GEO. IMMIGR. L. J. 257, 269 (2012). Currently, the formal categorical approach compares elements of the statute forming the basis of the defendant's state conviction with the elements of the "generic" federal crime, also described as "the offense as commonly understood." *Descamps*, 133 S. Ct. at 2281. The modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2285. Defense counsel must fully understand both concepts to competently inform their clients of the immigration consequences of a guilty plea and subsequent conviction.

Petitioner's request to create a distinction between elements and means would add an uncertain intermediate analytical step between the traditional categorical approach and the modified categorical approach, forcing defense counsel to determine if the alternatives listed in the statute are elements or means. As usual, counsel would begin with the categorical approach, but if the statute did not match the generic language due to alternatives listed in the statute, counsel could no longer simply move on to the modified categorical approach. Counsel would first have to examine the alternatives and decide whether the list contained alternative elements or alternative means. This additional intermediate step may appear simple, but there is no comprehensive source that could instruct counsel on a means versus elements distinction for state and federal statutes.

Yet not until counsel made this extremely important determination could the attorney then properly apply the modified categorical approach, or find that the statutory language was broader than the generic crime, and thus did not qualify as an aggravated felony.

The proposed intermediary step would create more confusion for defense counsel who are obligated to accurately inform their clients of the possibility of deportation for certain offenses. Counsel would have to determine if the list of alternatives were elements or means before advising the client on whether a plea would carry the consequence of deportation if convicted as required in *Padilla*. If counsel were to incorrectly categorize alternatives and thus cause a client to enter a guilty plea for a crime that carries deportation as a ramification, a client could maintain an action under *Padilla* and *Strickland v. Washington*, 466 U.S. 668 (1984) (providing the benchmark standard for effective representation of a client). There is no public policy reason to impose this potential liability on the criminal defense bar. "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendant. " *Padilla*, 559 U.S. at 298.

Affirming the Eighth Circuit's approach would allow defense attorneys to give clients more certainty when entering into a plea agreement with prosecutors, as to whether immigration consequences will flow from a guilty plea and subsequent conviction. "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation,

and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Padilla*, 559 U.S. at 371 (citing *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring in judgment). Instead of merely stating that there is a possibility of immigration consequences, defense attorneys could confidently advise their clients based upon the statutory language and accurately select the correct approach, *i.e.*, a categorical, modified categorical, circumstance-specific approach. In contrast, creating a muddled distinction between means and elements would inject even more confusion into the already complex categorical approach and its other analytical counterparts.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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RICHARD MATHIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae the National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court, including thousands who are facing or serving sentences under the Armed Career Criminal Act and other sentencing enhancement provisions. *Amicus* NAFD therefore have both particular expertise and interest in the subject matter of this litigation.

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL"), was founded in 1958, NACDL's approximately 9,000 direct members in 28 countries and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. In keeping with this commitment, NACDL files numerous *amicus* briefs with this Court and did

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), petitioner Mathis and the United States received timely notice of, and consented to, amici curiae's filing of this brief. Their consent letters have been filed with this brief.

so in the related cases of *Taylor* v. *United States*, 495 U.S. 575 (1990); *Shepard* v. *United States*, 544 U.S. 13 (2005); and *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). By offering its perspective, NACDL seeks to assist in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION

In his brief, petitioner Richard Mathis shows that the Eighth Circuit erred in permitting the district court to consult the record from his prior Iowa burglary convictions to determine whether those convictions triggered a 15-year mandatory minimum under the Armed Career Criminal Act (ACCA). *Amici curiae* agree with Mr. Mathis that this Court's decision in *Descamps* v *United States*, 133 S. Ct. 2276 (2013), prohibits such an inquiry. As petitioner's brief correctly explains, courts should apply the "modified categorical approach" only where a jury would have to unanimously decide between two or more alternatives in a statute such that those alternatives constitute "elements" of the offense, rather than a "means" of commission. As such, *amici* do not repeat those arguments here.

Amici write separately, however, to suggest the methodology that sentencing courts should use to determine whether a particular statutory alternative constitutes a "means" or an "element." Under this methodology, courts should presume a statute is "indivisible" unless the law of the convicting jurisdiction clearly requires a jury to unanimously decide between multiple statutory alternatives. While courts may look to the documents specified in *Shepard* v. *United States*, 544 U.S. 13, 16 (2005)—*i.e.*, the indictment, jury instructions, plea colloquy, and

plea agreement—to identify a defendant's crime of conviction once the statute is deemed divisible, courts should *not* consult these "*Shepard* documents" to make the threshold determination of whether a statutory alternative represents a means or an element. As the real-world examples in this brief demonstrate, many *Shepard* documents do not accurately distinguish a statute's elements from its means. Thus, unless relevant law shows that a statute defines multiple crimes, courts must abide by the presumption of indivisibility and hold that a defendant has not been "convicted of" a generic federal offense.

ARGUMENT

I. *SHEPARD* DOCUMENTS ARE NOT RELIABLE INDICATORS OF WHETHER A PARTICULAR STATUTORY ALTERNATIVE IS A "MEANS" OR AN "ELEMENT."

Amici urge the Court to correct the misperception among some lower courts that *Descamps* established a blanket rule permitting sentencing courts to rely on *Shepard* documents to ascertain statutory divisibility. In *Descamps*, this Court unequivocally rejected a lower court's attempt to substitute "a facts-based inquiry for an elements-based one," holding that the modified categorical approach does not apply to crimes that contain a "single, indivisible set of elements." 133 S. Ct. at 2282, 2293. In a brief footnote, the majority hypothesized that "[w]hatever a statute lists (whether elements or means), the documents we approved in *Taylor* [v. *United States*, 495 U.S. 575 (1990)] and *Shepard* would reflect the crime's elements." *Descamps*, 133 S. Ct. at 2285 n.2.

Since *Descamps*, some courts of appeals have relied on this passing observation to broadly assume that *Shepard* documents will *always* reflect a crime's elements—regardless of whether a particular jurisdiction's rules of procedure and practice support that assumption. See, *e.g.*, *Almanza-Arenas* v. *Lynch*, 809 F.3d 515, 524 (9th Cir. 2015) (en banc) (relying on "an examination of the *Shepard* documents" to determine whether a statute is indivisible); *Franco-Casasola* v. *Holder*, 773 F.3d 33, 40 (5th Cir. 2014) (upholding the means/elements distinction but stating that "reliance solely on the indictment will allow identification of the statutory elements that apply to the offense"); *United States* v. *Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) *cert. denied* (U.S. Feb. 23, 2015) (No. 14-7762) (concluding that a statute is divisible "when only one alternative appears in the charging document or plea agreement"). By doing so, these courts risk turning *Descamps*' core holding upside down by incorrectly presuming that factual allegations contained in a charging document represent a crime's elements, rather than one or more of its alternative means of commission.

In *amici*'s experience, many state[2] criminal justice systems have little to no awareness of the *Taylor* categorical approach and are ill-equipped to produce a record of conviction that accurately distinguishes a

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[2] Although state convictions comprise the majority of predicate offenses, sentencing courts also rely on prior federal crimes to impose a sentencing enhancement. Because the jurisdiction in which the offense arose would not affect the proposed methodology discussed here, *amici* assumes in this brief, for ease of reference, that the potential predicate is a state crime.

crime's elements from its means. From the filing of an initial charging document, to the modification of these allegations during criminal proceedings, to the entry of a guilty plea or the completion of a jury trial, the *Shepard* documents are often incomplete and untrustworthy indicators of whether statutory alternatives represent elements or means.

A. State Law And Rules Of Criminal Procedure Do Not Require *Shepard* Documents To Reflect A Crime's Elements.

The problems with state court documents begin with the initial charging document. In many states, the criminal code or applicable rule of criminal procedure permits prosecutors to allege in a single count of an indictment, information, or complaint "alternative theories of committing the offense." Minn. R. Crim. P 17.02(3).[3] Such rules and statutes

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[3] *See also* Ala. Code § 15-8-50 ("When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative."); Fla. R. Crim. P 3.140(5) ("For an offense that may be committed by doing 1 or more of several acts, or by 1 or more of several means, or with 1 or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results."); Ky. R. Crim. P 6.10(3) ("It may be alleged in any count that the defendant committed [the offense] by one or more specified means."); Mass. Gen. Laws Ann. ch. 277, § 31 ("Different means or different intents by or with which a crime may be committed may be alleged in the same count in the alternative."); Nev. Rev. Stat. § 173.075(2) ("It may be alleged in a single count that the defendant committed [the offense] by one or more specified means."); Ohio R. Crim. P. 7(B) ("It may be alleged in a single count that the defendant committed [the offense] by one or more specified means."); Okla. Stat. Ann. tit. § 22-404 ("[W]here the offense may be committed by the use of different means, the

give prosecutors an incentive to capture the defendant's conduct by drafting allegations as broadly as possible—rather than narrowing the allegations to pinpoint the elements of the crime.

These broad charging documents present two discrete concerns. First, they frequently include boilerplate statutory recitations that list multiple, alternative means of committing an offense, which a later sentencing court could mistake for the elements of the offense. In Colorado, for instance, an indictment may "state[] the offense in the terms and language of the statute defining it, including either conjunctive or disjunctive clauses [and] shall place a defendant on notice that the prosecution *may rely on any or all of the alternatives alleged*." Colo. Rev. Stat. Ann. § 16-5-201 (emphasis added).[4]

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means may be alleged in the alternative in the same count."); R.I. Super. R. Crim. P. 7(c) ("It may be alleged in a single count that the defendant committed the offense by one or more specified means."); Tenn. Code Ann. § 40-13-206(a) ("When the offense may be committed by different forms, by different means or with different intents, the forms, means or intents may be alleged in the same count in the alternative."); W. Va. R. Crim. P. 7(c)(1) ("It may be alleged in a single count that the defendant committed [the offense] by one or more specified means."); Wyo. R. Crim. P. 3(b)(1) ("It may be alleged in a single count that the defendant committed [the offense] by one or more specified means.").

[4] *See also State* v. *Laundy*, 103 Or. 443, 465-66 (Or. 1922) ("The indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means in the alternative.") (citation omitted); *State* v. *Grimsley*, 721 N.E.2d 488, 490 (Ohio Ct. App. 1998) (holding that although a count for aggravated robbery contained multiple alternatives, the indictment was sufficient because it "tracks the language of the statute precisely"); *State* v. *Roque*, 569 P.2d 417, 419 (N.M. Ct. App. 1977) ("[T]here is no duplicity because all that is charged is

Second, many common law offenses are charged using boilerplate terms that allege a patently incorrect version of the facts. For instance, Massachusetts permits prosecutors to charge assault and battery using only the language: "[the defendant] did assault and beat [the victim]"—even though the crime may be committed by an offensive or reckless battery that did not involve "beat[ing]" or anything resembling it. *United States* v. *Holloway*, 630 F.3d 252, 260 (1st Cir. 2011). See also *Commonwealth* v *Welansky*, 55 N.E.2d 902, 908 (Mass. 1944) (finding no deficiency in an indictment that alleged a nightclub owner "did assault and beat" the victims who died as a result of the owner's failure to maintain safe conditions in the club); *United States* v. *Kirksey*, 138 F.3d 120, 122, 125 (4th Cir. 1998) (acknowledging that the term "beat" in a charging document represents the "common law verb for a battery" and can be used to describe offensive touchings, such as throwing water on another or "kissing without consent") (citation omitted). Yet a federal sentencing court confronted with the language "assault and beat" in a *Shepard* document

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that the one robbery was committed in two ways[:] robbery without specification of the means and robbery by firearm. That is not duplicity. Rather, it is alternative pleading.") (citation omitted); *Vest* v. *State*, 930 N.E.2d 1221, 1226 (Ind. Ct. App. 2010) ("[W]here, as here, a criminal statute enumerates several acts disjunctively, and provides the same punishment for doing any one or all of said acts, then two or more of said acts may be charged conjunctively in a single count without objection for duplicity.") (quotations and citation omitted); *Hall* v. *State*, 261 So. 2d 521, 522 (Fla. Dist. Ct. App. 1972) ("For an offense which may be committed by the doing of one or more of several acts, or by one or more of several means, or with one or more of several intents or results, it is permissible to allege in the disjunctive or alternative such two or more acts, means, intents or results.") (citation omitted).

would have no way of knowing that it represented the state's standard charging language, rather than alternative elements of the offense.

Exceptions also exist to the general principle underlying *Descamps*' footnote 2—that "[o]ne offence only may be stated in a single indictment or count;" and if more than one offense is charged, "the indictment is bad for duplicity." Black's Law Dictionary (10th ed. 2014) (quoting Joseph Henry Beale, *A Treatise on Criminal Pleading and Practice* 103–04 (1899)). For instance, some states permit prosecutors to charge multiple crimes in the same count if they constitute a "continuing offense." See *State* v. *Lomagro*, 335 N.W.2d 583, 587 (Wis. 1983) ("If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge one continuous offense or a single offense or series of single offenses.") (quotations and citation omitted).[5] And even where a

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[5] *See also Vest*, 930 N.E.2d at 1226 ("[A] count or charge is not duplicitous when it alleges two or more acts committed in a single transaction even if each of the acts constitutes a separate and complete offense by itself.") (quotations and citation omitted); *State* v. *Didier*, 254 So. 2d 262, 265 (La. 1971) ("A count in an indictment is not duplicitous because, in stating the elements of the offense charged or describing how it was committed, it alleges criminal acts which would separately constitute another offense or other offenses.") (quotations and citation omitted); *Cooksey* v. *State*, 752 A.2d 606, 612 (Md. 2000) ("The other averments, although they could have been charged as separate offenses, were only recitals of the means taken by him to accomplish the end and considered as a whole, they constitute but one transaction.") (quotations omitted); *People* v. *First Meridian Planning Corp.*, 658 N.E.2d 1017, 1021 (N.Y. 1995) ("Where, however, a crime by its nature as defined in the Penal Law may be committed either by one act or by multiple

prosecutor oversteps state rules and errs by charging a duplicitous count, a defendant may "waive[] his right to challenge on appeal any pleading defects including that of duplicity" by failing to file a timely objection. *People* v. *Butler*, 615 N.Y.S.2d 843, 846 (N.Y. Sup. Ct. 1994).[6] If such waiver occurs, the duplicitous indictment would stand, preventing a

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acts and can be characterized as a continuing offense over time, the indictment may charge the continuing offense in a single count.") (citations omitted); *Commonwealth* v. *Bradshaw*, 364 A.2d 702, 705 (Pa. Super. Ct. 1975) ("To require grand juries to separate the offenses proscribed by one statute into separate counts is to require an 'overly technical' act."); *State* v. *Roberts*, 14 P.3d 713, 737 (Wash. 2000) (upholding a single count that charged "separate offenses" because separating them would not have provided the defendant "any additional or better notice").

[6] *See also Trounce* v. *State*, 498 P.2d 106, 110-11 (Alaska 1972) ("[A]n objection to the indictment on grounds of duplicity is waived unless this objection is raised prior to trial "); *State* v. *Hargrave*, 234 P.3d 569, 579 (Ariz. 2010) (holding that where the defendant failed to challenge the duplicitous indictment before trial, "he has waived this issue unless he can establish fundamental error."); *People* v. *Johnson*, 595 N.E.2d 1381, 1390 (Ill. App. Ct. 1992) ("Assuming, *arguendo*, that count III was duplicitous, improper joinder of offenses nevertheless may be waived") (citations omitted); *People* v. *Branch*, 73 A.D.2d 230, 234-35 (N.Y. App. Div. 1980) (holding that "[w]hile a jurisdictional defect may be raised for the first time on appeal," duplicity is not a jurisdictional defect, and the defendant's failure to raise it "constituted a waiver of any objection"); *State* v. *Saluter*, 715 A.2d 1250, 1254 (R.I. 1998) (allowing a duplicitous charging document to stand because the defendant forfeited his right to challenge it under state rules of criminal procedure); *Scruggs* v. *State*, 66 Tenn. 38, 39 (1872) ("[I]f [defendant] choose to submit to be tried on a count which is double, without objection in the court below, we cannot say the court erred in taking no action on this informal mode of charging him."); *Schuler* v. *State*, 181 P.3d 929, 932 (Wyo. 2008) (finding that the defendant "waived the issue by failing to raise it prior to trial").

later sentencing court from even identifying the offense of conviction, much less the elements of that offense.

A prosecutor's use of conjunctive versus disjunctive language also provides no assurances that a charged fact is a means or an element. It is an "accurate statement of the law" to say that "indictments charging in the conjunctive may be proven disjunctively." *United States* v. *Powell*, 226 F.3d 1181, 1193 (10th Cir. 2000); see also 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a), at 263 & n. 72, 284–85 & n. 178 (3d ed. 2007) (acknowledging that some jurisdictions allow prosecutors to charge a defendant in the conjunctive and prove their case in the disjunctive).[7] But this distinction does not hold true across the board, as some jurisdictions allow indictments to employ "either conjunctive or disjunctive clauses" Colo. Rev. Stat. Ann. § 16-5-201. Thus, prosecutors' latitude to charge facts that misrepresent the elements of an offense is so ubiquitous that it fundamentally undermines the trustworthiness of the *Shepard* documents as a representation of what a jury must have "necessarily found." *Descamps*, 133 S. Ct. at 2290.

Indeed, this Court recognized more than a century ago that there is "no sound reason why the doing of the prohibited thing in each and all of the prohibited

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[7] This practice likely traces back to the requirement that a grand jury must find probable cause for each conjunctively-phrased allegation in the count, while a factfinder need not do so to convict. *See United States* v. *LaPointe*, 690 F.3d 434, 440 (6th Cir. 2012) ("Indictments must be phrased in the conjunctive so that society can be confident that the grand jury has found probable cause for all of the alternative theories that go forward. Juries, on the other hand, may convict a defendant on any theory contained in the indictment.").

modes may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute." *Crain* v *United States,* 162 U.S. 625, 636 (1896); *accord. United States* v. *Miller*, 471 U.S. 130, 136 (1985). Earlier this term, the Court echoed this conclusion by acknowledging that prosecutors may "charge[] different means of committing a crime in the conjunctive" without those conjunctive alternatives representing two separate offenses. *Musacchio* v. *United States*, 136 S. Ct. 709, 715 n.2 (2016). Thus, a charging document's mere reference to a particular method of committing a crime provides a federal sentencing court no reliable indication of whether state law considers that method to be a means or an element.

The improbability that *Shepard* documents will distinguish the elements of an offense from the means of commission is not only evident at the initial charging stage but also during the period leading up to the guilty plea or trial. For instance, most states allow prosecutors to amend charging documents at any stage of the pre-pleading or pre-trial proceedings. See, *e.g.*, Cal. Penal Code § 1009 ("An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained."). But when a prosecutor amends a charging document, a future sentencing court has no way of knowing whether the particular charging document later presented to establish the elements of a predicate offense was the last and best version of the charge. See, *e.g., Medina-Lara* v. *Holder*, 771 F.3d 1106, 1114

(9th Cir. 2014) (holding that discrepancies in the record suggested the existence of a superseding indictment that the government had failed to produce); *United States* v. *Martinez*, 756 F.3d 1092, 1098 (8th Cir. 2014) (refusing to rely on facts alleged in an original charging document where the defendant pleaded guilty to an amended count that did not appear in the record).

Even assuming that later sentencing courts have access to a complete version of the record, this version may still contain an inaccurate recitation of the elements underlying the offense. *Descamps* itself recognized that defendants have "little incentive to contest facts that are not elements of the charged offense" and may, in fact, have good reason not to, since "extraneous facts and arguments may confuse the jury" at trial. 133 S. Ct. at 2289. And in pleaded cases, defendants similarly "may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations" when such allegations are "irrelevant to the proceedings" and will not result in a different outcome. *Id.* Thus, when a defendant pleads guilty to a charge that alleges an alternative factual way of committing an offense—as many state statutes and rules of criminal procedure allow her to do—future sentencing courts have no way of knowing from the record of conviction whether those facts reflect alternative "means" of committing that offense, rather than "elements."

Cases that proceed to trial may fare no better, as this Court's recent decision in *Musacchio* also illustrates. There, the trial court misinstructed a jury by adding an additional element that did not appear in the statute or the indictment. See 136 S. Ct. at 714. Specifically, while the statute "provide[d] two ways of committing the crime" (unauthorized

computer access *or* improper use of authorized computer access), the trial court erroneously added an element by instructing the jury that it must find both in order to convict. *Id.* at 713. *Musacchio* provides a perfect example of a case where, if a sentencing court were to examine the individual jury instructions in the record of conviction, it would conclude that the "two ways of committing the crime" were both required for conviction, regardless of whether they were actually elements or means. See also *State* v. *Beamon*, 830 N.W.2d 681, 692 (Wis. 2013) (holding that the trial court erred by instructing the jury that it must find the defendant received "a visual *and* audible signal from a marked police vehicle").[8] Thus, if an appellate court had relied on the jury instruction in Mr. Musacchio's case to identify the statute's elements, it would have reached an incorrect legal conclusion.

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[8] *See also State* v. *Lowery*, 565 S.W.2d 680, 683-84 (Mo. Ct. App. 1978) ("The effect of Instruction No. 6 was to submit the offense of robbery in the form of a conjunctive submission, placing a burden on the State beyond that which is legally required."); *Nickerson* v. *State*, 782 S.W.2d 887, 889-90 (Tex. Crim. App. 1990) (finding no error where the State failed to object to a jury instruction that added an element to the offense); *United States* v. *Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999) (holding that the trial court erred by instructing the jury that the defendant's "*sole* intent in making the transactions was tax evasion.") (emphasis added); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005) (finding error where the trial court mistakenly instructed that the defendant's act had to "substantially" affect interstate commerce when the statute only required "some" effect on interstate commerce); *United States* v. *Staples*, 435 F.3d 860, 866-67 (8th Cir. 2006) (finding error where the trial court erroneously instructed that bank fraud required the defendant to obtain money that was "owned by *and* under the custody of the financial institution");

As these examples show, state law and rules of criminal procedure—from the initial charge, to any subsequent amendments, to the guilty plea or jury trial—do not necessarily require a defendant's conviction record to accurately delineate between a crime's elements and its means. What is more, any rule permitting courts to use the documents in this way would fundamentally alter the nature of the categorical approach from that of a *legal* inquiry (i.e., "what are the statute's elements as a matter of law?") to a *factual* inquiry (i.e., "what particular words did a state court judge, prosecutor, or defendant use to describe the offense?"). Because the "central feature" of the categorical approach has always been its "focus on the elements, rather than the facts, of a crime," *Descamps*, 133 S. Ct. at 2285, the Court should correct the lower courts' misperception that *Shepard* documents will necessarily reflect those elements.

B. The Attached *Shepard* Documents Provide Real-World Examples Of Cases Where A Sentencing Court Would Not Have Been Able To Distinguish A Statute's Means From Its Elements.

To provide practical examples of *Shepard* documents' inability to distinguish means from elements, *amici* have attached an appendix to this brief that contains actual charging documents from several states. For instance, Appendix A contains four redacted charging documents alleging violations of the same vehicle theft statute (Cal. Veh. Code § 10851(a)) from four different California counties. The statutory language of § 10851(a) contains various alternatives worded in the disjunctive, including an intent either "to temporarily or permanently deprive the owner" But of the four charging documents, one charges an "intent to temporarily *and* permanently

deprive," the second alleges an "intent, either permanently *or* temporarily, to deprive," while the third and fourth merely charge an "intent to deprive the owner", with no mention of the taking's duration. See Appendix A. Thus, a sentencing court provided with the first or second charging document might believe that the temporal language represents alternative "elements" of § 10851(a), while a court given the third or fourth would reach the opposite conclusion. Accordingly, the record of conviction is not only unhelpful in discerning what a jury must have necessarily found, it has the potential to actively *mislead* courts as to the true elements of an offense.

Similarly, Appendix B contains two charging documents from two different Washington counties, both of which allege counts of theft and vehicle prowling. One count charges theft by repeating the statutory language of Wash. Rev. Code Ann. § 9A.56.020(1)(a) that includes the "property or services" of another, while another county cites the same definition but narrows the charge to "property." See Appendix B. The count alleging "property" would suggest to a sentencing court that a prosecutor has "select[ed] the relevant *element* from its list of alternatives," *Descamps*, 133 S. Ct. at 2290 (emphasis added), while the count alleging "property or services" suggests that these alternatives could be means *or* elements, depending on how one interprets the disjunctive wording. Likewise, one count alleges vehicle prowling under Wash. Rev. Code Ann. § 9A.52.100 by expressly stating that the offense may be committed as a "principle [sic] or accomplice," while another count omits this language entirely. See Appendix B. While a sentencing court may safely assume that a count omitting the "principle [sic] or accomplice" language suggests that this language is

superfluous (and thus a means), a sentencing court considering a count that included this disjunctive language might not be so sure.

Several indictments from Arizona would also confound sentencing courts. See Appendix C. The first indictment simply charges a defendant with "commit[ing] theft with a value of $4,000 or more but less than $25,000" under Ariz. Rev. Stat. § 13-1802(A), while the second indictment charges a defendant with "commit[ing] theft *by knowingly obtaining the property of another* in an amount more than $4,000 but less than $25,000 *by means of any material misrepresentation with intent to deprive the other of such property*," in violation of § 13-1802(A)(3). See Appendix C (emphasis added). While a sentencing court considering the second indictment in isolation might reasonably assume that the specific "property" and "material misrepresentation" allegations rendered subsection (A)(3) a separate crime, a sentencing court considering the first indictment could easily conclude that any violation of subsection of § 13-1802(A) constitutes a single offense. And a final example shows how sentencing courts that try to rely on the disjunctive versus conjunctive language of an indictment to discern a statute's elements would be confused by the *Shepard* documents, as the indictment, charges a defendant with committing money laundering by "knowingly initiating, organizing, planning, financing, directing, managing, supervising *and/or* was in the business of money laundering." See Appendix C (emphasis added).

These real-world examples illustrate that many *Shepard* documents are poor indicators of whether state law would require a jury to find, or a defendant to admit, the factual allegations contained in the

documents such that they represent elements, rather than means. Particularly in the 97 percent of federal convictions and 94 percent of state convictions that result from guilty pleas, see *Missouri* v. *Frye*, 132 S. Ct. 1399, 1402 (2012), neither the state court, nor the prosecutor, nor the defendant has any motive to narrow the defendant's judicial admissions to the actual elements of an offense so long as all parties agree that the facts satisfy those elements. As such, the fact-based *Shepard* documents, while effective indicators of the particular offense of conviction *under* the modified categorical approach, are ill-suited to determine *whether* the modified categorical approach should apply in the first place. Accordingly, *amici curiae* urge this Court to correct the lower courts' misperception that *Shepard* documents may be relied upon to determine whether a statute is divisible.

II. STATE LAW IS A RELIABLE AND ACCESSIBLE INDICATOR OF STATUTORY DIVISIBILITY.

Even if use of the *Shepard* documents would not lead to incorrect legal conclusions, it would nevertheless be beside the point because this Court has held it must defer to state courts' interpretations of whether a statutory alternative represents an "element" or a "means." In *Schad* v. *Arizona*, the Court considered whether a first-degree murder statute that could be facially divided into premeditated murder or felony murder required jurors to agree on which acts the defendant committed. 501 U.S. 624, 630-31 (1991) (plurality opinion). Characterizing this as a "value choice[]" more appropriately made by the state than by federal courts, the plurality invoked the need for judicial restraint and limited itself to the issue of whether the

Arizona court's decision not to require juror unanimity was constitutionally permissible, ultimately holding that it was. *Id.* at 637-38. The plurality confirmed that "*[i]f a State's courts* have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Id.* at 636 (emphasis added). The message of *Schad* is that courts must "look to a state's laws to determine whether that state's courts 'have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.'" *Almanza-Arenas*, 809 F.3d at 525 (quoting *Schad*, 501 U.S. at 636).

Not only are state court decisions an impartial source of authority to distinguish statutory elements from nonessential means, federal courts are "*bound by* the [state court's] interpretation of state law, including its determination of the elements of" a state offense. *Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (emphasis added). Indeed, courts already consult state law to determine what constitutes the "least of the acts criminalized" by a particular state statute. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 (2015) (quoting *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013)). And in identifying this "minimum conduct," *Moncrieffe*, 133 S. Ct. at 1684, courts necessarily look to state law to discern the acts that a jury would have to agree upon to convict the defendant of the crime.

The inquiry here is no different. In the context of disjunctively-worded statutes, courts must still look to state law to confirm whether a jury would have to

unanimously agree on acts that form a separate, distinct offense. And when it is only this separate, distinct offense, as defined by elements upon which a jury must agree, that matches the generic federal definition, courts must be confident that this conclusion of a categorical match is a legal one derived from state law. not a factual one derived from the language a state court judge, prosecutor, or defendant used to describe the offense below. If a court is not confident in this conclusion, there can be no assurance that a defendant was actually "convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the supposed generic crime " *Descamps*, 133 S. Ct. at 2290. Thus, whether a court looks to a statute's minimum elements to determine whether the *entire* statute is a categorical match, or whether a court looks to a set of elements representing a distinct crime contained *within* that statute, the inquiry is the same—courts must identify the conduct that a jury had to unanimously agree upon (or a defendant had to admit) to ensure that the elements of the crime match the elements of the generic offense.

To date, the inquiry into the elements of state offenses has not been overly burdensome or required more than "merely mundane legal research skills." *United States* v. *Aparicio-Soria*, 740 F.3d 152, 157 (4th Cir. 2014) (en banc). Indeed, those circuits that have already looked to state law to distinguish statutory "elements" from "means" have not encountered any serious difficulties resolving the issue. See, *e.g.*, *United States* v. *Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (citing state law to find a statute indivisible); *Trent*, 767 F.3d at 1061-63 (holding in the alternative that state law supported its

conclusion that the statute was divisible); see also *United States* v. *Montes-Flores*, 736 F.3d 368 (4th Cir. 2013); *Rendon* v. *Holder*, 764 F.3d 1077, 1089-90 (9th Cir. 2014); *Padilla-Martinez* v. *Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014); *Omargharib* v. *Holder*, 775 F.3d 192, 199 (4th Cir. 2014); *United States* v. *Simmons*, 782 F.3d 510, 517 (9th Cir. 2015); *Lopez-Valencia* v. *Lynch*, 798 F.3d 863, 869-70 (9th Cir. 2015); *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015); *United States* v. *Lockett*, 810 F.3d 1262, 1270-72 (11th Cir. 2016). Importantly, the court in each of these decisions readily reached a conclusion on divisibility *without* looking to the *Shepard* documents and did not find the inquiry unduly burdensome in their absence.

The question may arise as to whether courts could reasonably consult the *Shepard* documents *in combination with* state law to confirm an offense's elements. See *Almanza-Arenas*, 809 F.3d at 523-25 (employing a multi-step process in which courts first consult the statutory text and *Shepard* documents and then look to state law to "verify that our interpretation of elements versus means is consistent with how California would instruct a jury as to this offense."). The answer is no. As previously mentioned, use of the *Shepard* documents fundamentally compromises the integrity of the categorical approach by turning the legal inquiry into a crime's elements into a factual inquiry into how the state court judge and the parties described the offense below.

But even as a practical matter, resorting to *Shepard* documents offers no benefits and simultaneously carries the potential for great harm. Even in the best case scenario, a carefully-laid record of conviction that perfectly reflects state law and the prior criminal proceedings will still be of little use to

a later sentencing court because it will be facially indistinguishable from a record that does *not* accurately reflect state law. And in the worst case scenario, a court may believe that an inherently flawed set of *Shepard* documents carries more weight than—or completely eliminates the need to consult—state case law and rely on the former to erroneously sentence a defendant to a 15-year mandatory minimum. In other words, not only are the *Shepard* documents unable to confirm a *correct* legal conclusion as to the elements of the offense, they may very well trigger an *incorrect* conclusion—one with grave and irrevocable consequences.[9] Thus, *amici* urge this Court to hold that state law—not *Shepard* documents—is the appropriate tool for determining an offense's statutory elements.

III. IN THE RARE CASE WHERE STATE LAW IS INCONCLUSIVE, COURTS MUST APPLY A PRESUMPTION OF INDIVISIBILITY.

In the event that state law is unclear about whether an alternative is a "means" or an "element,"

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[9] Not only does this means/elements distinction affect a defendant's potential criminal sentence, it also impacts whether a non-citizen may be subject to removal from the United States or eligible for relief from removal under a variety of provisions in the Immigration and Nationality Act. *See Padilla* v. *Kentucky*, 559 U.S. 356, 364 (2010) (observing that under current immigration law, the non-citizen's removal was "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General"). In *Padilla*, the Court held that defense attorneys have an affirmative duty to advise their clients of the immigration consequences of a particular crime, *see id.* at 370-71—a duty made much easier by a presumption of statutory indivisibility than by a case-by-case analysis of *Shepard* documents.

see *Descamps*, 133 S. Ct. at 2301-02 (Alito, J., dissenting), this Court's precedents require that the statute be deemed indivisible. As *Descamps* explained, if there is no clear legal assurance that a statutory definition would "necessarily require an adjudicator to find the generic offense," courts must presume that a defendant has not been "convicted of" that generic offense. 133 S. Ct. at 2287

A. The Rationale Of *Taylor* And *Descamps* And The *Sullivan* Rule Require Courts To Presume That A Statute Is Indivisible In The Absence Of Case Law To The Contrary.

To justify a legal, categorical approach to ACCA predicates, both *Taylor* and *Descamps* cited three critical rationales underlying those decisions, all of which support a presumption of statutory indivisibility. First, the cases explained that ACCA's language expressly references a defendant's "previous *convictions*," rather than the facts underlying these convictions. *Taylor*, 495 U.S. at 600 (citing 18 U.S.C. § 924(e); *Descamps*, 133 S. Ct. at 2287 (same). This language shows that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Descamps*, 133 S. Ct. at 2287 (quoting *Taylor*, 495 U.S. at 600).

The same logic applies to a statute's facial alternatives. If state law does not clearly reveal whether a defendant was convicted of the *elements* of an offense, rather than the facts underlying a particular *way* of committing it, there can be no assurance that a defendant was "*convicted*, in the deliberate and considered way the Constitution

guarantees," of the generic federal definition. *Id.* at 2290 (emphasis added). Thus, where state case law does not definitively establish a crime's elements, sentencing courts must adhere to the plain language of the ACCA statute and presume that statutory alternatives represent only alternative "means of commission." *Id.* at 2289.

Second, in both *Taylor* and *Descamps* the Court employed the categorical approach to "avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps*, 133 S. Ct. at 2287. These concerns "counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as *the theory of the crime*." *Id.* at 2288 (quoting *Shepard*, 544 U.S. at 25 (plurality opinion) (emphasis added)). But if a sentencing court cannot conclusively say that a statutory alternative represents an "element," rather than a mere "theory of the crime," its reliance on a prior offense to trigger an ACCA enhancement risks committing the identical Sixth Amendment violation by "rely[ing] on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id.* at 2289. Because "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances," *id.* at 2288, courts must avoid constitutional concerns by assuming—in the absence of state case law showing to the contrary—that a statutory alternative represents no more than a means of committing the offense.

Third, *Taylor* and *Descamps* confirmed the wisdom of employing the categorical approach by pointing to "the practical difficulties and potential unfairness of a factual approach." *Descamps*, 133 S. Ct. at 2287 (quoting *Taylor*, 495 U.S. at 601). *Descamps* explained that courts relying on a circumstance-based approach "would have to expend resources examining (often aged) documents" to screen for facts that, "although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* at 2289. But "[t]he meaning of those documents will often be uncertain," and "the statements of fact in them may be downright wrong." *Id.* Likewise, a sentencing court that combs a record of conviction to discern whether a particular fact constitutes an "element" or a "means" will often be led astray by documents that had no obligation to make such a distinction at the time of the conviction. Such an approach would trigger "practical difficulties and potential unfairness" by allowing a later sentencing court's fact-based speculation as to the elements of an offense to preempt state courts' *actual legal conclusions* on the same issue. Thus, in the absence of unambiguous state case law showing that a statutory alternative is an "element," the three rationales in *Taylor* and *Descamps* require a sentencing court to presume that the statute is indivisible.

If the reasons underlying *Taylor* and *Descamps* were not enough, a century-old line of state court cases applies the default presumption that, where a statute on its face contains multiple, alternative ways of committing an offense, it is "not necessary that all the jurors should agree" on which alternative the defendant employed because it was "sufficient that each juror was convinced beyond a reasonable doubt

that the defendant had committed the crime as that offense is defined by the statute." *People* v. *Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903). Known as the "*Sullivan* rule," this doctrine holds that "where a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed " *People* v. *Sutherland*, 21 Cal. Rptr. 2d 752, 758 (Cal. Ct. App. 1993). Indeed, in *Schad*, the Court recognized that the *Sullivan* rule had "sufficiently widespread acceptance" to regard it as "the norm."[10] *Schad*, 501 U.S. at 642. Thus, where state law fails to elucidate a statute's elements, courts must, at a minimum, defer to long-standing state law doctrine rejecting the "erroneous assumption that any statutory alternatives are *ipso facto* independent elements defining independent crimes under state law." *Id.* at 636.[11]

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[10] Even states that have not adopted the "*Sullivan* rule" follow the rule, stated in *United States* v. *Gipson*, 553 F.2d 453, 458 (5th Cir. 1977), which holds that alternatives in a disjunctively-worded statute may be separated into "distinct conceptual groupings," each of which would constitute a separate offense. *Schad*, 501 U.S. at 634-36 (plurality opinion). Thus, even jurisdictions that do not follow the *Sullivan* rule recognize that "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes" *Id.* at 636.

[11] A presumption of statutory indivisibility within the categorical approach also fits neatly with the rule of lenity. *See McNally* v. *United States*, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when [the legislature] has spoken in clear and definite language."). As this Court has recognized, the categorical approach is an exercise in statutory interpretation. *See Shepard*, 544 U.S. at 23 (stating that "[w]e are, after all, dealing with an issue of statutory interpretation") (citing *Taylor*, 495 U.S. at 602). Thus,

B. Iowa Law Supports, Rather Than Defeats, The Presumption Of Statutory Indivisibility.

Applying these principles to Mr. Mathis's case reveals that Iowa law does not require a jury to agree that a defendant has committed the generic federal definition of "burglary" in order to convict him. Below, the Eighth Circuit recognized that Iowa defines an "occupied structure" for purposes of the burglary statute to include "land, water, or air vehicle[s]," which fall outside *Taylor*'s generic definition of burglary that requires entry into a "building or structure." *United States* v. *Mathis*, 786 F.3d 1068, 1074 (8th Cir. 2015), *cert. granted* (U.S. Jan. 19, 2016) (No. 15-6092) (quoting Iowa Code § 702.12). But in *State* v. *Duncan*, the Supreme Court of Iowa rejected the contention in a burglary prosecution that "the jury had to be unanimous on guilt with respect to" a particular type of "occupied structure"—in that case a boat or a marina. 312 N.W.2d 519, 523 (Iowa 1981). *Duncan* explained that "[i]f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *Id.* To reach this conclusion, the Iowa Supreme Court expressly relied on the *Sullivan* rule—quoting the language of *People* v. *Sullivan*, citing other states that had adopted it, and acknowledging that it had previously "applied an aspect of th[at] rule." See *id.* at 523-24.

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if it is unclear whether a state legislature intended to create two separate crimes or merely two different ways of committing the same crime, and if state law does not provide a ready answer, the rule of lenity requires federal courts to resolve the question without resort to the modified categorical approach.

This state authority affirmatively shows that Iowa law does not require a jury to agree upon the type of "occupied structure" the defendant entered in order to convict him of burglary—thus, the particular structure is a "means" of committing the offense, rather than an "element." And even in the absence of such state authority, Iowa's adoption of the *Sullivan* rule would require a sentencing court to identify contrary state authority providing clear legal assurance that a jury would have to decide between generic and non-generic conduct—authority sufficient to overcome the presumption of indivisibility. Thus, as in *Descamps*, the modified categorical approach does not apply because "[w]e know [Mr. Mathis'] crime of conviction, and it does not correspond to the relevant generic offense." *Descamps*, 133 S. Ct. at 2286.

Such a result may seem counterintuitive in cases where, as here, the record of conviction suggests that Mr. Mathis' conduct *actually involved* a "building or structure." See *Mathis*, 786 F.3d at 1074-75 (noting that two of Mr. Mathis' burglary charges alleged that he entered a garage). But the record in *Descamps* contained similar documents showing that the defendant pleaded guilty to the "breaking and entering of a grocery store." 133 S. Ct. at 2282. Yet the Court found this fact to be beside the point, reminding us that "[w]hether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id.* at 2286; see also *United States* v. *Brown*, 765 F.3d 185, 194 (3d Cir. 2014) (recognizing that the defendant's offenses would "appear to be 'crimes of violence' to a layperson" but explaining that "the factual circumstances of the conviction are not what matter, the key is the elements of the crime").

Because an elements-based approach compels a presumption of statutory indivisibility that has not been overcome in this case, the Eighth Circuit erred in applying the modified categorical approach below.

C. The Presumption Of Statutory Indivisibility Does Not Prevent Courts From Considering A Defendant's Criminal History.

The failure to apply an ACCA sentencing enhancement under 18 U.S.C. § 924(e)(1) does not mean that defendants like Mr. Mathis will not be convicted of the underlying offense of being a felon in possession of a firearm, or even that they will escape enhanced punishment for their prior offenses. Even in the absence of a sentencing enhancement, the federal Sentencing Guidelines rely on a defendant's prior offenses to assign the defendant a Criminal History Category that will assist in determining the appropriate sentencing Guidelines range. See U.S.S.G. § 4A1.1 (assigning points based on the number and length of a defendant's prior criminal sentences). And if Mr. Mathis's Guidelines range were lower than the statutory maximum sentence, the sentencing court had the discretion under 18 U.S.C. § 3553(a)(1) to rely on his "history and characteristics" to vary upwards and impose a maximum sentence of ten years. See 18 U.S.C. § 924(a)(2). Additionally, the government could have sought an upward departure if it believed the Guidelines calculation under-represented Mr. Mathis's prior criminal history. See U.S.S.G. § 4A1.3(a) (permitting a sentencing court to depart upward if the defendant's criminal history category "substantially underrepresents the seriousness of the defendant's criminal history"). As such, the absence of an ACCA enhancement in no way prevents courts

from convicting Mr. Mathis for being a felon in possession of a firearm or relying on his past crimes to enhance the sentence through any number of non-categorical avenues.

Moreover, nothing prevents prosecutors from seeking ACCA enhancements for crimes that still fall at the heart of the "violent felony" definition—i.e., those that have as an element the "use, attempted use, or threatened use of physical force" See 18 U.S.C. § 924(e)(2)(B)(i). Furthermore, Congress may always amend the statutory scheme to abolish the categorical approach altogether, as the Sentencing Commission has sought to do in certain Guidelines contexts. See "Immigration," *Proposed Amendments to the Sentencing Guidelines (Preliminary)*, United States Sentencing Commission, Jan. 8, 2016, p. 8 (proposing amendments to U.S.S.G. § 2L1.2 that would be "based on the sentence imposed rather than on the type of offense (e.g., 'crime of violence')" and thus "eliminate the use of the "categorical approach").[12] And as Justice Kennedy stated in his concurrence to *Descamps*, Congress may always take action if it "wishes to pursue its policy in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes." 133 S. Ct. at 2294.

But until such steps are taken, the same concerns underlying *Taylor* and *Descamps*, as well as the *Sullivan* rule, prevent courts from assuming that a statute's disjunctive terms, subsections, or phrases automatically trigger application of the modified categorical approach. Only where state law—rather

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[12] *Available at*: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RFP.pdf

than a defendant's *Shepard* documents—unambiguously establishes that a jury must unanimously decide between these statutory alternatives may a sentencing court look to the record of conviction to determine "which statutory phrase was the basis for the conviction." *Johnson*, 559 U.S. at 144. Thus, *amici curiae* urge this Court to adopt the methodology set forth in this brief to determine whether a crime's statutory alternatives constitute means or elements.

Because state law—not *Shepard* documents—accurately reflects whether a particular statutory alternative constitutes a "means" or an "element," *amici curiae* ask the Court to hold that sentencing courts should look exclusively to state law to determine statutory divisibility and, in the absence of it, apply a presumption of indivisibility.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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February 29, 2016

APPENDIX

APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
PITTSBURG

[Filed Dec. 15, 2014]

No. 182923-3
DA NO. C 14 013893-3
COMPLAINT – FELONY
01) CVC 10851(a)

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs.

DEFENDANT./

The undersigned states, on information and belief, that _____, Defendant, did commit a felony, a violation of VEHICLE CODE SECTION 10851(a) (UNLAWFULLY DRIVING OR TAKING VEHICLE), committed as follows:

On or about July 2, 2014, at Pittsburg, in Contra Costa County, the Defendant, _____ did unlawfully drive and take a 1992 Nissan _____, a vehicle which was owned by _____ without the consent of the owner and with the intent to temporarily and permanently deprive the owner of title to and possession of the vehicle.

COMPLAINANT REQUESTS THAT DEFENDANT(S) BE DEALT WITH ACCORDING TO LAW I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: December 1, 2014
AT MARTINEZ, CALIFORNIA

_____

FREDDIE L. MARTINEZ/mp
DEPUTY DISTRICT ATTORNEY

GREGORY D. TOTTEN
District Attorney
800 S. Victoria Avenue
Ventura, CA 93009

SUPERIOR COURT OF CALIFORNIA
COUNTY OF VENTURA

VCIJIS Case [redacted]

THE PEOPLE OF THE STATE OF CALIFORNIA,

vs

[redacted],

Defendant(s).

Amended Felony Complaint

☐ Complaint Deemed Information

The undersigned is informed and believes that:

COUNT 1

On or about April 08, 2015, in the above named Judicial District, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of Vehicle Code 10851(a), a Felony, was committed by [redacted] who did unlawfully drive and take a certain vehicle, to wit, 2002 Suburu Forrester [redacted] then and there the personal property of [redacted] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Special Allegation 1

It is further alleged that the defendant, [redacted], prior to the commission of the above offense was convicted of the following:

Court Case # [redacted]

Charge [redacted]

Dt Offense [redacted]

Dt Conviction [redacted]

Court [redacted]

Jurisdiction [redacted]

within the meaning of Penal Code section 667(c)(1), 667(e)(1), 1170.12(a)(1), and 1170.12(c)(1).

Special Allegation 2

It is further alleged pursuant to Penal Code section 1170(h)(3) that an executed sentence for a felony shall be served in state prison because DUKE JOHN TINOCO has suffered the following prior serious or violent felony conviction(s):

Court Case # [redacted]

Charge [redacted]

Dt Offense [redacted]

Dt Conviction [redacted]

Court [redacted]

Jurisdiction [redacted]

NOTICE: Pursuant to Penal Code section 1170(f), the above allegation is not subject to dismissal.

CASE NAME: [redacted]

CASE NUMBER: [redacted]

Arresting Agency: [redacted]

Arresting Agency Report No: [redacted]

Date Taken into Custody: [redacted]

VIOLATION OF LAW BY CHILD

The child is a person described by section 602 in that

1. the child was under the age of 18 years at the time of the law violations alleged below, and
2. the child has violated the following laws of the State of California, or of the United States, or any ordinance of a city or county of California.

(State, describe, and number as separate counts each code section and subdivision that the child is alleged to have violated, and as to each count, whether it is a misdemeanor or felony.)

COUNT 1

On or about January 11, 2015, in the County of Santa Clara, State of California, the crime of THEFT OR UNAUTHORIZED USE OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by [redacted] who did drive and take a vehicle, a Honda Motorcycle, belonging to [redacted] without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle.

COUNT 2

On or about January 11, 2015, in the County of Santa Clara, State of California, the crime of PURCHASING, RECEIVING, OR POSSESSING TOBACCO OR

PARAPHERNALIA, in violation of PENAL CODE SECTION 308(b), an Misdemeanor, was committed by [redacted] who did while under the age of 18 years, purchase, receive, and possess any tobacco, cigarette, cigarette papers, a preparation of tobacco, and any instrument and paraphernalia designed for smoking tobacco and products prepared from tobacco.

Any juvenile, who is adjudicated that he or she comes within the description of Welfare and Institutions Code section 602 due to the commission of any felony offense, including any attempt to commit the offense, charged in this petition is required to provide buccal swab samples, right thumbprints and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to the DNA and Forensic Identification Database and Data Bank Act of 1998 and Penal Code section 296, et seq.

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ATTORNEYS FOR THE PEOPLE

THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

FELONY COMPLAINT

Case Number: [redacted]

THE PEOPLE OF THE STATE OF CALIFORNIA

Plaintiff,

v.

[redacted]

The Undersigned, being sworn says, on information and belief, that:

COUNT: I

The said defendant, [redacted] did in the City and County of San Francisco, State of California, on or about the [redacted] 2015, commit the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, to wit: Violating Section 10851(a) of the California Vehicle Code, a Felony, in that the said defendant did willfully and unlawfully drive and take a certain

vehicle not his/her own, to wit: [redacted] without the consent of [redacted] the owner thereof, and with the intent then and there to deprive said owner of his/her title to and possession of said vehicle.

COUNT: II

[redacted]

APPENDIX B

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF OKANOGAN

[Filed Jan. 20 2015]

No. [redacted]

STATE OF WASHINGTON,

Plaintiff,

vs.

[redacted]

Defendant

INFORMATION

KARL F. SLOAN, Prosecuting Attorney in and for the County of Okanogan, Washington by this INFORMATION, accuses the Defendant above-named of the crime(s) committed as follows:

COUNT NO. 1

RCW 9A.56.040(1)(c) and RCW 9A.56.020(1)(a) – Theft in the Second Degree – Access Device – Wrongfully Obtain or Exert Unauthorized Control.

On or about January 13, 2015 in the County of Okanogan, State of Washington, the above-named Defendant, as principle or accomplice, did wrongfully obtain or exert unauthorized control over an access device of another, to-wit: NCNB debit card, with intent to deprive such other of such property; contrary to Revised Code of Washington 9A.56.040(1)(c) and 9A.56.020(1)(a).

Maximum Penalty – Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.56.040(2) and RCW 9A.20.021(1)(c), plus restitution and assessments.

COUNT NO. 2

RCW 9A.56.040(1)(c) and RCW 9A.56.020(1)(a) – Theft in the Second Degree – Access Device Wrongfully Obtain or Exert Unauthorized Control.

On or about January 13, 2015 in the County of Okanogan, State of Washington, the above-named Defendant, as principle or accomplice, did wrongfully obtain or exert unauthorized control over an access device of another, to-wit: NCNB debit card, with intent to deprive such other of such property; contrary to Revised Code of Washington 9A.56.040(1)(c) and 9A.56.020(1)(a).

Maximum Penalty – Five (5) years imprisonment and/or a $10,000 fine pursuant to RCW 9A.56.040(2) and RCW 9A.20.021(1)(c), plus restitution and assessments.

COUNT NO. 3

RCW 9A.56.050 – Theft in the Third Degree

On or about January 13, 2015 in the County of Okanogan, State of Washington, the above-named Defendant, as principle or accomplice, did (1) wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services, to wit: cash; and/or (2) obtain control over the property or services of another, or the value thereof, by color or aid of deception, with the intent to deprive that person of such property or services; and/or (3) appropriate lost or misdelivered property or services of another, or the

value thereof, with intent to deprive that person of such property or services; contrary to Revised Code of Washington 9A.56.050(1) and 9A.56.020.

Maximum Penalty—Three Hundred Sixty-Four (364) days in jail or $5,000 fine, or both pursuant to RCW 9A.20.021 (2), plus restitution, assessments and court costs.

COUNT NO. 4

RCW 9A.52.100(1) – Vehicle Prowling in the Second Degree

On or about January 13, 2015 in the County of Okanogan, State of Washington, the above-named Defendant, as principle or accomplice, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a vehicle other than a motor home or a vessel equipped for propulsion by mechanical means or by sail and which has a cabin equipped with permanently installed sleeping quarters or cooking facilities; contrary to Revised Code of Washington 9A.52.100(1).

Maximum Penalty—Three Hundred Sixty-Four (364) days in jail or $5,000 fine, or both pursuant to RCW 9A.20.021 (2), plus restitution, assessments and court costs.

DATED this 20th day of January, 2015

KARL F SLOAN
Prosecuting Attorney
Okanogan County, Washington

BY: /s/ [Illegible]
Joseph M. Caldwell WSBA# 22201
Criminal Deputy Prosecutor

SUPERIOR COURT OF WASHINGTON
DOUGLAS COUNTY

[Filed Jan. 14, 2015]

No. 15[redacted]

DCPA LOG NO. 15-01-000041

STATE OF WASHINGTON,

Plaintiff,

v

[redacted]

Defendant.

INFORMATION

COMES NOW STEVEN M. CLEM, Prosecuting Attorney for Douglas County, by and through W GORDON EDGAR, Deputy Prosecuting Attorney, and hereby alleges that [redacted] did commit the following crimes:

COUNT I

THEFT IN THE FIRST DEGREE

On or about January 13, 2015, in the State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, having a value exceeding $5,000.00, with Intent to deprive him or her of such property or services, to-wit: did commit theft of a $9,400 check from Brewster

Manufacturing, contrary to RCW 9A.56.020(1)(a) and RCW 9A.56-030(1) (a).

Theft in the First Degree is a Class B felony and has a maximum penalty of ten (10) years imprisonment and/or a $20,000 fine, pursuant to RCW 9A.56.030(2) and RCW 9A.20.021(1)(b), plus restitution, assessments and court costs.

JIS Code: 9A.56.030(1)(a) Theft 1

COUNT II

MAIL THEFT

On or about January 13, 2015, in the State of Washington, the above-named Defendant did wrongfully obtain or exert unauthorized control over ten or more separate pieces of mail addressed to three or more different addresses, with intent to deprive the addressees of such mail, contrary to RCW 9A.56.010(7), RCW 9A.56.020(1)(a) and RCW 9A.56.370(1).

Mail Theft is a Class C Felony and has a maximum penalty of five (5) years imprisonment, and/or a $10,000 fine, pursuant to RCW 9A.56.370(3) and RCW 9A.20.021(1)(c), plus restitution, assessments and court costs.

JIS Code: 9A.56.370 Mail Theft

COUNT III

VEHICLE PROWLING IN THE SECOND DEGREE

On or about January 13, 2015, in the State of Washington, the above-named Defendant, with intent to commit a crime against a person or property therein, did enter or remain unlawfully in a vehicle, other than a motor home or a vessel equipped for propulsion by mechanical means or by sail which had

a cabin equipped with permanently installed sleeping quarters or cooking facilities; contrary to RCW 9A.52.0100(1).

Vehicle Prowling in the Second Degree is a Gross Misdemeanor and has a maximum penalty of 364 days in jail and/or a fine of $5,000, pursuant to RCW 9A.52.100(2) and RCW 9A.20.021(2), plus restitution, assessments and court costs.

JIS Code: 9A.52.100 Vehicle Prowling 2

DATED: 1/14/15

/s/ [Illegible]
W Gordon Edgar, WSBA #20799
Deputy Prosecuting Attorney

Defendant Identification Information:

[redacted]

[Address source—(1) Jail records, if in custody, (2) Law Enforcement report, if not in custody, or (3) Washington Department of Licensing, if no other address information available.]

DOB: [redacted]	Alias: [Person Alias DOB SSN]
[redacted]	Race: White
Height: [redacted]	Weight: [redacted]
Hair: [redacted]	Eyes: [redacted]
FBI: [FBI NUMBER]	WA SID: [S.I.D. NUMBER]
DOL: [redacted]	WA DOC:
PCN:	

APPENDIX C

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

Cause No. [redacted]

THE STATE OF ARIZONA,

Plaintiff,

vs.

[redacted]

Defendant.

INDICTMENT

[redacted]

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse [redacted], and charge that in Pima County:

COUNT ONE: FRAUDULENT SCHEME AND ARTIFICE, A CLASS TWO FELONY

On or about the 1st day of September, 2012 through the 30th day of April, 2014, [redacted] pursuant to a scheme or artifice to defraud, obtained a benefit from [redacted] and/or [redacted], by means of false or fraudulent pretenses, representations, promises or material omissions, in violation of A.R.S. § 13-2310.

COUNT TWO: THEFT OF PROPERTY OR SERVICES, A CLASS THREE FELONY

On or about the 1st day of September, 2012 through the 30th day of April, 2014, [redacted], committed theft with a value of $4,000 or more but less than $25,000 belonging to [redacted] and/or [redacted], in violation of A.R.S. § 13-1802 (A)

COUNT THREE: TAKING THE IDENTITY OF ANOTHER, A CLASS FOUR FELONY

On or about the 1st day of September, 2012 through the 30th day of April, 2014, [redacted], knowingly took, used, purchased, manufactured, recorded or possessed any personal identifying information of [redacted], without his consent, for an unlawful purpose, in violation of A.R.S. § 13-2008 (A) (D).

COUNT FOUR: FRAUDULENT USE OF A CREDIT CARD, A CLASS FIVE FELONY

On or about the 1st day of September, 2012 through the 30th day of April, 2014, [redacted], with the intent to defraud, obtained or attempted to obtain goods and/or services valued at $1,000 or more, by using a credit card or credit card number, type-issuer-card number, belonging to: [redacted] and/or [redacted], which was obtained or retained in violation of the law or which was known to be forged, expired, canceled or revoked, in violation of A.R.S. §§ 13-2105 (A) (1) and (B).

MP: 14070792

BARBARA LAWALL
PIMA COUNTY ATTORNEY

A True Bill
[redacted]

By /s/ [Illegible]

Dated 8-18-14

* * *

2002(A)(3), 13-603, 13-701, 13-702, 13-703, 13-801, 13-804, and 13-811.

COUNT TWENTY TWO
THEFT, A CLASS 3 FELONY

On or about October 2010 through November 2011, [redacted] committed theft by knowingly obtaining the property of another in an amount more than $4,000 but less than $25,000, from [redacted] by means of any material misrepresentation with intent to deprive the other of such property, in violation of A.R.S. §§ 13-1802(A)(3), (G), 13-603, 13-701, 13-702, 13-703, 13-801, 13-804 and 13-811.

BARBARA LaWALL
PIMA COUNTY ATTORNEY

By /s/ [Illegible]
DOUG L. CLARK
Assistant Attorney General

/s/ [Illegible]
(A "True Bill")

Dated: 4-14-15

By:_____
Foreperson of the Grand Jury

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF PIMA

Cause No. [redacted]

THE STATE OF ARIZONA,

Plaintiff,

vs.

001 [redacted]
002

Defendants.

DIRECT INDICTMENT

[redacted]

The grand jurors of the County of Pima, in the name of the State of Arizona, and by its authority accuse [redacted] and [redacted] and charge that in Pima County:

COUNT ONE: ATTEMPTED POSSESSION OF MARIJUANA FOR SALE, A CLASS THREE FELONY

On or about the 29th day of June, 2011, [redacted] and [redacted] attempted to unlawfully possess marijuana for sale having a weight of four pounds or more, in violation of A.R.S. § 13-3405 (A) (2).

COUNT TWO: MONEY LAUNDERING IN THE SECOND DEGREE, A CLASS THREE FELONY

On or about the 29th day of June, 2011, [redacted] and [redacted] committed money laundering in the second degree by knowingly initiating, organizing, planning, financing, directing, managing, supervising and/or was in the business of money laundering, in violation of §13-2317 (A) (1) and (B) (1).

COUNT THREE: CONSPIRACY TO POSSESS MARIJUANA FOR SALE, A CLASS TWO FELONY

On or about the 29th day of June, 2011, [redacted] and [redacted] unlawfully conspired to possess marijuana for sale having a weight of four pounds or more, in violation of A.R.S. § 13-3405 (A) (2).

DA: MQ-11-0117

MIS: Known AKA's: [redacted]

BARBARA LAWALL
PIMA COUNTY ATTOURNEY

A True Bill
[redacted]

By /s/ [Illegible]

Dated 10/21/14